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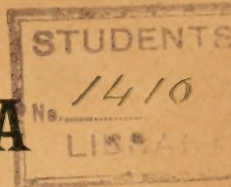
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THE  
PRINCIPLES OF THE INTERPRETATION  
OF  
WILLS AND SETTLEMENTS.



THE  
Principles of the Interpretation  
OF  
WILLS AND SETTLEMENTS.

BY  
ARTHUR UNDERHILL, M.A., LL.D.,

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## PREFACE.

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A LATE Lord Chief Justice once observed, in the Court of Appeal, in the hearing of one of us, that he did not believe there were any rules for the interpretation of Wills or Settlements. In a sense this *obiter dictum* was right; for where a Will or Deed is unambiguous, then, so far as the interpretation is concerned—the arriving at the testator's or settlor's expressed intention—the only rule is unimaginative common sense and sound judgment. As Lord LINDLEY once said: "When I see an intention clearly expressed in a Will, and find no rule of law opposed to giving effect to it, I disregard previous cases" (*a*). To the same effect is a *dictum* of Lord HALSBURY, in *Inderwick v. Tatchell*, [1903] A. C., at p. 122: "I confess I approach the interpretation of a Will with the greatest possible hesitation as to adopting any supposed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why then I think one must read the whole instrument as well as one can, and conclude what

*a* *Re Stone, Baker v. Stone*, [1895] 2 Ch. 496, at p. 200.

really its effect is intended to be by looking at the instrument as a whole." See also the same learned Lord in *Scalcé v. Rawlins*, [1892] A. C., at p. 343.

But, unfortunately, a large proportion of such documents (at all events of Wills) are not in this happy state of lucidity, even when looked at as a whole. They are ambiguous or equivocal, or even contradictory; and in such cases the principles which former Judges have enunciated for arriving at a conclusion as to the intention are undoubtedly of great value. Not that they must be used slavishly. The true way is, doubtless, to form an opinion apart from cases, and then to see whether these cases necessitate a modification of that opinion (*b*). To "construe one man's nonsense by another's" is mere pedantry; but to apply the same rules of sound judgment (and rules of interpretation are rather rules of judgment than of law) to the interpretation of documents is but common sense. Moreover (as Lord HALSBURY said in *Kingsbury v. Walter*, [1901] A. C., at p. 187), "rightly or wrongly, certain canons of construction have been acted upon for so long that I think it would be impossible now to disregard them, partly upon the ground that it is to be assumed—whether the assumption is well founded or not I do not stop to enquire—that lawyers draw instruments with reference to the known state of the law,

(b) See *Re Blanton, Low v. Cooke*, W. N. (1891) 54.

and the known state of the law is supposed to be those canons of construction which from time to time have been adopted by the courts in the construction of Wills." Examples of this are afforded by the rules as to vesting and divesting the intermediate income of contingent gifts, the period at which classes are to be ascertained, and the persons to be included in such classes, the meaning of issue as a word of limitation, and the like.

We have, therefore, endeavoured to extract from the decisions some broad general principles which will assist the practitioner in the interpretation of ambiguous Wills and Settlements, and to show the reasons which have led to the adoption of these principles; for without these reasons the soundness of the principles is not always immediately apparent.

We are, of course, well aware that, with regard to Wills, Mr. VAUGHAN HAWKINS has, many years ago, forestalled us, and we are conscious how difficult it is to follow adequately his lead. We think, however, that no writer has, so far, treated of the interpretation of Wills and Settlements together (*c*), although the general principles applicable to both are much the same.

We have endeavoured to prove and illustrate our rules by the most modern cases, partly

(c) We have not lost sight of Mr. BEAL'S Work, but that deals with interpretation generally, including statutes, deeds in general, and agreements.

because these rules of interpretation (like most rules of Courts of Equity) are refined and improved from time to time, and partly because by referring the reader to the most modern authority, he will there find quoted all, or most of the previous cases. The present Edition has been enlarged by 120 pages, and it is hoped that this will render it more useful to practitioners. The current authorities have been noted down to the June numbers of the Law Reports.

Lastly, we desire to point out that this Book is not intended to be a compendium of case law on the subject. The works of the late Mr. JARMAN, Mr. THEOBALD, K.C., and Mr. NORTON, K.C., leave no room for such a work. All that we have sought to do is to extract from the mass of authorities a set of broad general principles, and to illustrate these principles by a selection of cases. Where no general principle can be gathered (as in the construction of particular words) we have not endeavoured to trace an imaginary road through "the wilderness of single instances," believing that too often such labours are the result of intellectual mirage. In these cases we have, therefore, contented ourselves with giving in the glossary a reference to the more modern decisions.

A. U.

J. A. S.

LINCOLN'S INN.

*June, 1906.*

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## CORRIGENDA.

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Page 60, *Grimond v. Grimond*. For "630" read "603."

72, *Crofts v. Beamish*. For "[1905] 2 L. R. 349" read "[1905] 1 L. R. 349."

91, *Dimond v. Bostock*. For "10 Ch. D." read "10 Ch. App."

160, *Johns v. Wilson*. For "1905" read "1900."

379, in second paragraph, after *Re Clinton's Trust*, add "and see also *Re Bland's Settlement*, *Bland v. Perkins*, [1905] 1 Ch. 4."

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THE  
PRINCIPLES OF THE INTERPRETATION  
OF

# Wills and Settlements.

## PART I.

### GENERAL PRINCIPLES.

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#### ART. 1.—*Words presumed to have their usual Meaning.*

THE object of the court, in construing a will or deed, is to ascertain the intention by reading the words of the will or deed in the sense in which the testator or the parties used them. In doing so it applies the following principles :

- (1) It presumes that ordinary and technical or foreign words are used in their usual meaning (unless

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the presumption is rebutted as explained in the next article). This presumption is stronger in the case of deeds than in that of wills, and in the case of technical legal terms than in that of ordinary or foreign words, or words of art.

(2) Where a word is used in a clear and definite meaning in one part of a will or deed then the presumption is that it means the same thing where, when used in another part, its meaning is not clear.

(3) To ascertain the usual meaning of a word, the court may, where it is an ordinary word, consult a dictionary; and where it is a technical or foreign word, hear expert evidence, unless the word is a technical term of English law.

## PARAGRAPH (1).

Authorities  
on this main  
principle.

“The first duty of the court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide: but the expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, What is the meaning of that which he has actually written? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction, and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible to place the court in the position of the testator” (*per* Lord

WENSLEYDALE in *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, at p. 876).

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“The true rule is that laid down by Vice-Chancellor KINDERSLEY, in *Low v. Smith* (1856), 2 Jur. (N.S.) 344, where he says, referring to Lord ST. LEONARDS’ decision in *De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524 : ‘There was no peculiarity in this particular question; it was a mere application of what was the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary and primary meaning, unless the court is satisfied that the testator intended to use it in a secondary and less proper sense.’ This applies to all wills, and not the less so when any particular word used by a testator is a technical word and a word of art, which is less difficult to construe” (*per* JESSEL, M.R., in *Smith v. Butcher* (1878), 10 Ch. D. 113, at p. 115).

“Where language is used in a deed which in its primary meaning is unambiguous and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; such meaning, in that case, conclusively states the writer’s intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations; the first, that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning: the second, that being ‘sensible with reference to the extrinsic circumstances’ is not meant that the extrinsic circumstances make it more or less reasonable or probable [*q.v.*] that the primary meaning is what the writer should have intended; it is enough if those

Ordinary and technical words.

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circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning" (*per* COLERIDGE, J., in *Shore v. Wilson* (1842), 9 Cl. & F. 355, at p. 525).

"When technical words or phrases are made use of, the strong presumption is that the party intended to use them according to their correct technical meaning, but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially from ignorance or inadvertence or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. . . . Many cases may doubtless be found in which the technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favour of legal construction" (*per* PLUMER, M.R., in *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, at p. 91).

Application  
of the rule  
to wills.

The rule here stated as applicable to deeds is equally applicable to wills, with this qualification, that, both as to ordinary and technical words, wills are interpreted less strictly than deeds: In other words, less evidence is sufficient to induce the court to hold that the words used are not used in their primary meaning. The rule as to ordinary words in wills is stated by Lord HERSCHELL, in *Seale-Hayne v. Jodrell*, [1891] A. C. 304, at p. 306, in the following terms: "I do not think there is any hard and fast rule to be laid down, that in construing a will you are always to give any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses, must be interpreted according to that which, having regard to the

context and the whole provisions of the document which you have to construe, appears to be the sense in which the testator has used it." And the rule as to technical words is laid down by Lord WATSON, in *Hamilton v. Ritchie*, [1894] A. C. 310, at p. 313, thus: "I do not say that a testator who writes his own will, and is not a lawyer, is in all cases to be held to have rightly apprehended the meaning of technical words which he may have used on the occasion of making his will: but I think it is plain that a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning unless the context of the instrument shows that he intended to do so."

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Para. (1).

A clearer context, or stronger evidence from surrounding circumstances, is needed to convince the court that a technical legal term is not used in its technical sense than to convince it that an ordinary word is not used in its ordinary sense (*Leach v. Jay* (1878), 9 Ch. D. 42). And a still clearer context or still stronger evidence from surrounding circumstances is needed to convince it that a technical legal term used with reference to real estate is not used in its technical sense, than is needed to convince it that a technical legal term used with reference to personal estate is not used in its technical sense (see *per* JESSEL, M.R.: *Miles v. Harford* (1879), 12 Ch. D. 691, at p. 698). And see *Rog v. Rog* (1897), 24 Ind. App. 76.

It sometimes happens that an ordinary word having a definite ordinary meaning, where it occurs in a particular kind of legal document, has (in consequence of a rule of law affecting the subject-matter of the legal document) a meaning larger than, or otherwise different from, the ordinary meaning. The principle here applied is akin to that applicable to words which, in certain trades or districts, have a customary meaning, with this difference—that the use of the word in the legal sense is a point of law and not merely a point of fact. Extrinsic evidence is,

Technical legal terms.

Quasi technical legal terms.

**Art. 1.** therefore, not necessary to show that it is used in its legal sense.

Para. (1).

Illustration  
of technical  
meaning  
being upheld.

*McCowan v. Bain*, [1891] A. C. 401, is an example of the manner in which a technical rule of law may induce the court to read words in an instrument in a different sense from their literal meaning. There, in a marine policy, a ship was insured in these terms: "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay and shall pay to the persons interested in such other ship or vessel any sum or sums of money," underwriters were to indemnify the insurees. While being towed into a harbour, the tug of the ship insured collided with another vessel, and the owners of the ship insured became liable in consequence to pay a sum of money to the owners of the damaged ship. The underwriters contended that they were not liable to indemnify the insured against these payments, on the ground that the collision was not between "the ship hereby insured," but between the tug of the ship insured and another vessel:—*Held* that, since by a rule of law when a ship is being towed the tug and the ship are regarded as one vessel, the words in the policy covered a collision between the tug and the other vessel, and the underwriters were liable. Lord WATSON, in delivering judgment, said, at p. 408: "I admit the force of the appellant's argument that contracts ought to be construed according to the primary or natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words: and another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether,

in making it, the parties had or had not the law in their contemplation.” **Art. 1.**

Para. (1).

As to the construction of mercantile instruments generally, see *Lewis v. Marshall* (1844), 7 Man. & G. 729, at p. 745. And as to the interpretation of contracts made by telegraphic code words, see *Falek v. Williams*, [1900] A. C. 176. Mercantile instruments.

#### PARAGRAPH (2).

This is the rule laid down by LINDLEY, M.R., in *In re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, at p. 418, which, as he there says, is good sense, whether it is a canon of construction or not. That case is itself a very good example of it. There the instrument was a will, and the word to be construed was “issue.” The testator used this word in the course of the will twelve several times. In eleven of these it clearly was used in the sense of children. In the twelfth case it might be read equally well as meaning either “children” or “descendants” generally. The Court of Appeal, reversing KEKEWICH, J., held that in the twelfth case it must be read as having the same meaning as in the other eleven—that is, children. And *cf. In re Veun, Lindon v. Ingram*, [1904] 2 Ch. 52, cited *infra*, p. 36.

#### PARAGRAPH (3).

Where the words used are ordinary words, the court may consult a dictionary to ascertain their meaning (*Mathew v. Purchings* (1606), Cro. Jac. 203). Where they are technical words—other than technical terms of English law—or foreign words, the court is entitled to receive expert evidence to aid it to arrive at their proper meaning or their meaning in English (*Shore v. Wilson* (1842), 9 Cl. & F. 355, at p. 555). The same rule applies to an instrument written in cypher (*Kell v. Charmer* (1856), Evidence as to meaning of words

**Art. 1.** 23 Beav. 195), or in any other way which is illegible or incomprehensible to the court without the help of such evidence (*Rosen v. Hayward* (1835), 2 Ad. & El. 666). As to technical legal terms, if they are terms of English law, no extrinsic evidence, save the decisions of English courts, the dicta of recognised legal text books, and the practice of conveyancers (see *In re Maddy, Maddy v. Maddy*, [1901] 2 Ch. 820), is admissible as to their meaning (*In re Athill, Athill v. Athill* (1880), 16 Ch. D. 211, at p. 223); but if they are terms of foreign law, their meaning should be proved by the evidence of lawyers who practise, or have practised, in the country of whose law the words are terms (*In re Cliff's Trusts*, [1892] 2 Ch. 229).

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**ART. 2.—Circumstances which will Rebut the Presumption that Words are Used in their usual Meaning.**

(1) Words in a will or deed will be held to be used in a sense different from their usual meaning under the following circumstances:

- (a) When the context clearly shews that they are used in a different sense.
- (b) When they have no reasonable application to the condition of things with reference to which the will or deed was made, unless read in a different sense, provided such sense is one which they can reasonably bear.
- (c) When being used in relation to a place or trade, they have a customary sense different from

**Art. 2.**  

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their ordinary meaning, unless there is something in the context or in the condition of things with reference to which the will or deed was made to exclude the customary sense.

(d) When, being names or descriptive words, they properly describe no object in the condition of things with reference to which the will or deed was made, and it is shewn that the testator or parties habitually used them to describe a certain object.

(e) When, being words applicable to persons or things generally, they are used as additional to words all of which are specifically applicable to persons or things belonging to one definite class, and there is nothing to shew that they were intended to apply to persons or things not *sui generis* (i.e., belonging to that class), not included under the specific words.

(f) When, being obscure, and occurring in an ancient will or deed, they are shewn (by the conduct of those acting in execution of the provisions of the will or deed), to have been habitually understood in a sense different from their usual sense.

(2) Provided always, that if upon considering the whole will or deed and all the circumstances within the preceding paragraphs which would affect the meaning of the words used, the court can clearly ascertain the intention of the testator or the parties,

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that intention will determine the sense in which any particular words are to be read : and if it be impossible to reconcile any particular words with that intention, the court will reject them : and if any particular words necessary to express fully or accurately that intention are wanting, the court will supply them.

(3) All relevant evidence *as to circumstances within the preceding paragraphs* which would affect the meaning of the words used (but not direct evidence of intention) will be admitted by the court, whether such evidence consist of facts appearing on the face of the will or deed, or of facts altogether extrinsic to it.

## PARAGRAPH (1) (a).

*Procedural*  
meaning  
affected by  
context.

In construing any particular phrase or expression in a will or deed, the court does not confine its attention to that particular phrase or expression. It construes it not as an isolated statement, but as part of the whole instrument, and gives it the meaning which will render it consistent with the rest of the instrument, even though that meaning be not precisely the primary meaning of the expression or phrase in question. In the words of Lord ELLENBOROUGH, C.J., in *Barton v. Fitzgerald* (1812), 15 East, 530, at p. 541, "It is the true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* ; every part of it may be brought into action in order to collect from the whole one uniform and consistent meaning, if that may be done." And see *McCowan v. Baine*, [1891] A. C. 401, at p. 408, and *supra*, p. 6.

Illustration  
of meaning  
affected by  
context.

In a settlement made before marriage, there was a covenant to settle on certain trusts all the real and personal

property, to which the wife or the husband "in her right at any time *during her now intended coverture* shall become entitled (except 'jewels' and other articles of a like kind) which it is hereby declared shall belong to the 'wife' for her separate use." The trusts upon which the property to be settled were to be held, included a trust to sell and hold the purchase moneys on the same trusts as those declared of the personal estate of or to which the wife "now is or she or 'the husband' in her right shall become possessed or entitled as aforesaid." The wife at the time of the marriage possessed certain jewels, and after the marriage the question arose whether these jewels were included in the settlement, and therefore the wife's separate property under the exception therein made as to jewels, or whether they were not so included, and therefore were the husband's property *jure mariti*. The court held that though, primarily, only property coming to the wife after coverture would seem to be included in the covenant to settle, still, when that covenant was read in conjunction with the subsequent trust (which in terms applied to both the property she possessed at the marriage, and that subsequently accruing to her), it was evident that the covenant was intended to extend to all the wife's property, whether belonging to her before marriage or accruing to her after it; and consequently that the jewels in question were her separate property under the settlement. Lord SELBORNE, L.C., in delivering judgment, said: "If the words are capable of the sense of which I think they are capable . . . the question for your lordships is, whether that is the true sense of the words in this settlement; and that is to be ascertained, not from a context of words more or less dissimilar in some other settlement, but from the whole contents of this settlement. I am of opinion that the words are capable of such a sense. I do not say that they bear it so clearly that they might not be repelled by a context, or even by extrinsic circumstances looked at in connection with the context which would tend to repel it;

Art. 2.

Para. (1) (a).

Art. 2. but we have to consider what we have here. Looking at the immediate context only, as far as I can form an opinion I think that there might be something to be said on both sides, but certainly the construction is not repelled by any particular words which would exclude those articles. And we find later on, in the same instrument, words which appear to me most plainly and expressly to show that it was meant to include these things—words which must be rejected if these things are not included” (*Williams v. Merrier* (1884), 10 App. Cas. 1, at p. 8).

#### PARAGRAPH (1) (b).

*Prima facie*  
meaning  
affected by  
surrounding  
circum-  
stances.

“In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer, than by referring to the old rules of pleading as to innuendos in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *prima facie* bore, unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning the plaintiff as connected with those facts. If those preliminary averments were proved, words which *prima facie* bore a very innocent meaning might be shown to convey a very injurious one, and it was for the court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo. . . . In construing written instruments I think the same principle applies. In the cases of wills, the testator is speaking of and concerning all his

affairs ; and therefore evidence is admissible to show all that he knew, and then the court has to say what is the intention indicated by the words when used with reference to these extrinsic facts ; for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family. In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words (see *Graves v. Legg* (1854), 9 Exch. 709). In neither case does the court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention indicated by the words used under such circumstances really is" (*per* Lord BLACKBURN, in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, at p. 763).

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 Para. (1) (b).

"You must bring in facts where the words require explanation ; that is to say, you must bring in those facts which enable you to stand in the testator's shoes, or, as it is sometimes phrased, to sit in his chair, and see the objects which the will affects" (*per* KEKEWICH, J. : *Re Harrison, Harrison v. Higson*, [1894] 1 Ch. 561, at p. 564).

"The court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he uses" (*per* Lord CAIRNS : *Charter v. Charter* (1874), L. R. 7 H. L. 364, at p. 377).

The condition of things to be taken into consideration by the court in construing wills and deeds is the condition of things in reference to which the will or deed was made. That is not necessarily the actual condition of things when the will or deed was made. A will or deed may be made

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**Art. 2** with reference to an assumed condition of things which in fact is not the actual condition of things. In such a case, if the will or deed sets out definitely the assumed condition of things in reference to which it was made, no extrinsic evidence will be admissible to prove the actual state of things. Thus a will contained an erroneous recital to the effect that the testator had made certain advances to certain of his children during his lifetime, and on that assumption the will proceeded to direct that these advances should be brought into hotchpot :—*Held*, that evidence that such advances were never made or were smaller in amount than stated in the will, was not admissible (*In re Aird's Estate*, *Aird v. Quick* (1879), 12 Ch. D. 291 ; *In re Wood*, *Ward v. Wood* (1886), 32 Ch. D. 517 ; and see *In re Bagot*, *Paton v. Ormerod*, [1893] 3 Ch. 348).

The decision in *In re Aird's Estate*, *supra*, was reviewed by SWINFEN EADY, J., in the case of *In re Kelsey*, *Woolley v. Woolley*, [1905] 2 Ch. 465. There a testator after erroneously reciting that a legatee owed him £5,000, forgave him £2,000, and directed him to bring the balance of £3,000, or "so much thereof as might remain unpaid" at the distribution of assets into hotchpot. His lordship, after dividing erroneous recitals into two classes, one in which the recital shows a clear intention of charging a legatee with a definite sum, and the other in which though a definite sum is stated, yet the testator shows an intention to charge the legatee only with the sum actually due, held that this case came within the second class. He was also of opinion that *In re Aird's Estate*, *supra*, also came within class two, and on the authority of *In re Taylor*, *Tomlin v. Underhay* (1882), 22 Ch. D. 495, 500, refused to follow it.

In the same way, the recital of a particular fact in a deed, estops all parties to the deed if it is clearly intended to be a declaration of all the parties to the deed, and estops the party who makes it where it is intended to be the declaration of that party only, from denying the truth of it (*per*

PATTESON, J., in *Stronghill v. Buck* (1850), 14 Q. B. 781, at p. 787). **Art. 2.**

Para. (1) (b).

It is to be remembered that what is here said applies merely to the question of construction. A will or deed in which the assumed condition of things is very different from the actual condition of things may be open to attack on the ground of fraud, mistake, or mental incapacity on the part of the testator or party. We are here speaking merely of the interpretation, not of the validity, of the instrument (see *infra*, p. 42).

The state of a testator's family is of importance to show who are included under a general description. Thus if the gift be to "my children," the fact that one of his reputed children is illegitimate, would ordinarily be held to show that it was not intended to include him or her in the description (see *infra*, Part II., Chapter II.). Again, in a gift to "my nephews and nieces," the fact that the testator had not at the date of his will any nephews or nieces of his own, and that all his brothers and sisters were then dead, would be relevant to show that the words nephews and nieces referred to the testator's wife's nephews and nieces (*Sherratt v. Mountford* (1873), 8 Ch. 928; and see *Crosthwaite v. Dean* (1868), 5 Eq. 245; *In re Ingle's Trusts* (1871), 11 Eq. 578).

The state of a testator's property is of importance to show what is included under a general or even a specific gift. Thus, under the old law, a gift of "all my lands in S. shire" passed the testator's freeholds only, if he had both freeholds and leaseholds in S. shire, but passed his leaseholds if he had no freeholds. And in a specific devise under the present law a testatrix left "all that and those messuage or tenement, house, buildings, farm, and lands called H. . . . situate in the parish of L., containing eighty acres more or less . . . now in the occupation of C. D.," to C. D., his heirs and assigns. On proof that the

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 Para. (1)(a)

farm called H. contained 175 acres, that all of it was in the occupation of C. D., and that of the 175 acres about eighty-nine were freehold in the parish of L., about sixty-five were copyhold in the parish of L., and the rest were copyhold in the adjoining parish, it was held that this evidence showed that the testatrix meant not to devise the whole of H. farm to C. D., but merely the eighty-nine acres of it which were freehold and within the parish of L. (*Whitfield v. Langdale* (1875), 1 Ch. D. 61).

At the same time the condition of a testator's estate must not be gone into for the purpose of altering the meaning of language itself perfectly clear and perfectly applicable to definite objects in the condition of things to which the will refers. Thus in *Higgins v. Dawson*, [1902] A. C. 1, a testator, when he made his will, owed two mortgage debts which together constituted his whole personal estate. By his will, after directing the payment of his debts and funeral and testamentary expenses, he bequeathed certain legacies, and gave to three persons "all the residue and remainder" of the two mortgage debts after payment of his debts and funeral and testamentary expenses (not adding "and legacies"). The two mortgage debts were just sufficient to pay the debts, funeral and testamentary expenses and legacies. But before his death the testator acquired other personal estate. There was no general residuary clause in the will:—*Held*, that "all the residue and remainder" referred only to the rest of the mortgage debts after payment of debts and funeral expenses, and were not equivalent to a gift of the whole residue of his personal estate.

Testator's  
 knowledge  
 or acquaintance.

The state of a testator's knowledge or acquaintance is or may be important. If a bequest is left simply to John Smith, proof that the testator was acquainted with one John Smith would tend to show that he was the John Smith referred to. In the words of Lord CAIRNS, L.C., in *Craven and Hervey-Bathurst v. Errington and Others*

(1877), 37 L. T. 338, at p. 339, "In construing the will of the testator . . . we should put ourselves as far as we can in the position of the testator and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed." And see *In re Vaughan* (1901), 17 T. L. R. 278.

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Para. (1) b

On the same principle, evidence is admissible to show the testator's knowledge that a certain person has predeceased him (*Re Whorwood, Ogle v. Sherborne* (1887), 34 Ch. D. 446), or that at the date of the will a certain person was dead, leaving only illegitimate children (*Re Herbert's Trusts* (1860), 1 Jo. & H. 121), or that he entertained certain religious opinions (*Bunbury v. Doran* (1874), Ir. R. 8 Cl. L. 516), to aid the court in ascertaining the meaning of the words of the will. And see *In the Goods of Chappell*, [1894] P. 98.

The admission of extrinsic evidence of surrounding circumstances has been carried very far in the matter of identifying beneficiaries and others referred to in wills. As we have seen, where the words refer to the thing given if there is something in existence which adequately answers the words of the will, the court will not admit extrinsic evidence to show that something else or something more was intended (*Higgins v. Dawson, supra*). But that principle seems to have been departed from where the words refer not to a thing but to a person. Thus in *Charter v. Charter* (1874), 7 H. L. 364, a testator, called Forster Charter, had had three sons, Forster, William Forster—always known as William—and Charles. The first died before the testator made his will, the second lived at a great distance from the testator, and was not on good terms with him, and the third lived with the testator, his wife and his daughter Barbara, whom the testator in his will called "Barbara Forster." The will appointed "my son, Forster Charter," executor, left him the house

Identification  
of beneficiaries

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*Page 115 (16).*

and farm occupied by the testator at his death, made provision for Forster Charter and the testator's wife and daughter ceasing to live together, and directed "my executor Forster Charter" to pay "Barbara Forster" an annuity. Probate having been granted to William Forster Charter, on a citation to recall probate :—*Held*, that direct evidence of declarations by the testator was not, but the evidence of the state, circumstances and habits of the testator and his family was, admissible to show that by "Forster Charter" the testator meant Charles Charter.

Here it may be said that the context of the will raised a presumption that by "Forster Charter" the testator really meant Charles Charter. This can hardly be said, however, as to the case of *Henderson v. Henderson*, [1905] 1 L. R. 353. There a testator left property in trust for his "grandsons Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain twenty-one years." The testator had, at the date of the will, three grandsons—one called Robert William, the son of Oliver, who was living, and two others called William Robert and John Barnett respectively, the sons of a deceased son of the testator, called Robert William Marshall Henderson. There was a recital in the will as follows: "As I have recently given to my son, Oliver Henderson, the sum of £1,023, which I consider an ample provision for him, I do not leave him anything by this my will":—*Held*, that evidence of surrounding circumstances was admissible to show that by "my grandson, Robert William Henderson," the testator meant not his grandson Robert William, but his grandson William Robert.

The only recital which could be said to raise a presumption that "Robert William Henderson" was not used by the testator to describe the grandson bearing that name was that as to the advancement of his father Oliver. If this raised any presumption at all it was a very weak one. The decision undoubtedly carries the rule further

than any of the previous decisions. See, further, *Re Hooper, Hooper v. Warner* (1903), 88 L. T. 160, and *Re Chenoweth, Ward v. Dwyer* (1901), 17 T. L. R. 515 ; *In re Blake's Trusts*, [1904] 1 L. R. 98.

**Art. 2.**

Para. (1) (b).

The principle applicable to deeds is the same as that applying to wills, with this difference (as pointed out by Lord BLACKBURN, in *River Wear Commissioners v. Adamson*, *supra*), that, as a will deals with the testator's affairs generally, therefore the state of his affairs generally is relevant, while as a deed refers usually only to a particular transaction, matters connected with that transaction alone are relevant. Thus in the case of the grant of a lease, the condition of the property leased at the date of the grant is a relevant fact, of which the court will admit evidence to assist it to construe a covenant to repair in the lease (*Lister v. Lane*, [1893] 2 Q. B. 212). A dictum of RIGBY, L.J., in *Broomfield v. Williams*, [1897] 1 Ch. 602, at p. 616, goes even further. It is to the effect that the condition of land at the time an agreement to convey it is entered into may be taken into consideration in construing the subsequent conveyance, though in the meantime the condition of the land has changed. And see *Pryor v. Petre*, [1894] 2 Ch. 11 ; and, *infra*, Part III., Chap. I.

Evidence of surrounding circumstances in relation to the interpretation of deeds.

Where the instrument to be construed is ancient, and therefore the surrounding facts of a public nature are not within the cognizance of the court, the court may ascertain those facts by referring to the writings of historians, to contemporary documents, and to all other sources of evidence such as a historian investigating the period would resort to (*Ridgdale v. Clifton* (1877), 2 P. D. 276 ; *Reed v. Bishop of Lincoln*, [1892] A. C. 644).

Ancient documents.

#### PARAGRAPH (1) (c).

"As words and phrases of speech are to be expounded and construed as they are generally understood, so it is likewise in particular places ; and therefore, if I covenant

Local, customary, and trade meanings.

**Art. 2.** to convey to another an acre of land in Cornwall, the common acceptance of the word ‘acre’ there amounts to as much as a hundred of other counties, so a ‘perch’ in Staffordshire is as much as twenty perches in some other places, therefore such words must be governed by the common and known acceptance of the people” (*per curiam*, in *Barkdale v. Morgan* (1693), 4 Mod. 185).

Again, in *In re Steel, Wappett v. Robinson*, [1903] 1 Ch. 135, a testatrix devised to X. her “freehold land and hereditaments at M.” in Westmoreland. She had both “freeholds” and “customary freeholds” at M. It was shown that by local usage at M. customary freeholds were called freeholds simply, and that the testatrix was unaware of the distinction in tenure:—*Held*, that both the freeholds and the customary freeholds passed to X. And see *Brunner v. Moore*, [1904] 1 Ch. 305, where on evidence of business usage “month” was held to mean not a lunar but a calendar month. And see *In re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176, at p. 188, where in considering whether “securities” could be held equivalent to “investments” the court dwelt on the necessity of admitting, where necessary, evidence of the use of such phrases by persons accustomed to deal in stocks and shares.

Customary  
meaning a  
question of  
fact.

Whether a certain word or phrase has, when used in a certain connection, a customary meaning different from its natural or usual meaning is always a question of fact: but it sometimes is a question of fact which the court will itself decide, without calling for extrinsic evidence to support the customary meaning. When this is the case, the custom which gives the word its customary meaning is said to be judicially recognised—that is, the courts have had the fact, that under certain circumstances the word has a customary meaning, so often brought to their attention, that they have at length taken judicial cognizance of the fact. Until the custom becomes a judicially recog-

nised custom, extrinsic evidence of the custom is necessary to prove to the court that there is a special custom which gives the words in question the customary meaning alleged (*per* CHANNELL, J. : *Moult v. Halliday* (1898), 77 L. T. 794, at p. 796).

**Art. 2.**

Para. (1) (c).

So far as wills are concerned, custom seldom goes further than to modify the sense in which words or phrases are presumed to be used ; but in the case of deeds, as we shall shortly see, special custom not infrequently introduces provisions altogether unexpressed in the instrument.

Customary meanings in wills.

## PARAGRAPH (1) (d).

This rule is akin to that stated in paragraph (1) (c). It has, however, one important point of difference. The rule as to customary meaning prevails even though the words in their ordinary meaning would create no difficulty in applying the instrument to the facts. This is clear from the instances given in *Barksdale v. Morgan, supra*. The rule now stated, however, only prevails when the words of the instrument taken in their ordinary sense do not properly apply to the facts. If the words taken in their ordinary meaning apply properly and without difficulty to the facts, the court will not admit evidence to show that the testator or parties used them habitually in a different sense. Thus, in *Doe v. Orenden* (1810), 3 Taunt. 147, a testator devised his "estate at Ashton" to O. It was held that his estate situate at Ashton only, passed to O., and that evidence was not admissible to show that the testator habitually included land situate elsewhere in the term "Ashton estate." And the fact that such a construction will cause inconvenience, is no ground to induce the court to depart from it. Thus, in *In re Seal, Seal v. Taylor*, [1894] 1 Ch. 316, the testator devised "my residence called Stoneleigh House and the premises thereto as the same are now occupied by me" to his wife.

Words habitually used by the testator inaccurately.

**Art 2.** At the date of his will, and up to his death, the field adjoining Stoneleigh House, the lower part of the outhouses (which was approached from a private road) but not the upper room (which could be approached only through Stoneleigh House) and the washhouse and offices in the yard of Stoneleigh House were occupied by the testator's sons for the purpose of their business. It was contended on behalf of the wife that, as it would be extremely inconvenient to have part of the outhouses and the offices and washhouse in the yard severed from the rest of the house, the words "as the same are now occupied by me" should be rejected as *falsa demonstratio* (see *infra*, p. 56) on the ground that there was property of the testator which answered precisely to the description in the will, and when that was the case the court could not alter the natural construction of the words merely because the result of construing them naturally would be inconvenient to some of the beneficiaries. And see *Higgins v. Dawson*, [1902] A. C. 1, *supra*, p. 16.

Habitual  
misdescrip-  
tion of  
persons where  
persons  
are wrong  
to the  
description  
given.

The same rule applies where the words in question refer not to the gift but to the objects of the gift. If they apply aptly to a certain person, or class of persons, evidence will not be admissible to show that the testator or parties habitually applied the words improperly to other persons or classes of persons. Thus, in the case of *In re Parker, Beatham v. Wilson* (1881), 17 Ch. D. 262, a testator gave one third of his property to his first cousins, and two-thirds to his second cousins. At his death he left first cousins, second cousins, and children and grandchildren of first cousins. The court, though the point was not actually decided, intimated that evidence that the testator was in the habit of describing the children of his first cousins as second cousins would not be admissible. On the other hand, in *In re Jeans, Upton v. Jeans*, W. N. (1895) 98, the testator left his property to his "children." He had no children, and therefore the description did not

aptly apply to any persons. Evidence was admitted to show that he was in the habit of calling his wife's children by a previous husband, his children, and that they were intended to take under the gift. And see *In re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565; *Flood v. Flood*, [1902] 1 I. R. 538; and *British Home for Incurables v. Royal Hospital for Incurables* (1904), 90 L. T. 601.

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 Para. (1) (d).

### PARAGRAPH (1) (e).

This rule must be read subject to Article 1 and Paragraph 2 of this Article. By the first of these, general words, like other words, are *primâ facie* to be taken in their usual meaning—that is, in their general meaning. And by the latter, when the intention of the parties or the testator is clearly ascertained, the meaning to be given to general words, like other words, is governed by that intention. All that the present paragraph means is that the fact that general words are preceded by specific words all indicating a certain class of persons or kind of things, suggests that the general words were used not in their general sense but in a sense restricted to other persons or things included in that class or kind, but not covered by the specific words. See *per* POLLOCK, C.B., in *Lyndon v. Standbridge* (1857), 2 H. & N. 45, at p. 51: "It is a general rule of construction that, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class."

Restriction of general words following particular persons or things, to persons or things *ejusdem generis*.

The tendency of the decisions of late, more especially in the case of wills, has been rather to disregard or restrict this doctrine of *ejusdem generis* (see *Hodgson v. Jex* (1876), 2 Ch. D. 122); and if the *dicta* of some of the judges are to be accepted, practically it has ceased to exist. For example, Lord ESHER, M.R., in *Anderson v. Anderson*,

Modern tendency to disregard *ejusdem generis*.

**Art. 2.** [1895] 1 Q. B. 749, at p. 753) states the rule thus:  
 Para. 31/10. “*Primo facit* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before.” Stated thus, the rule is merely an application of the broader rule that the intention when ascertained is to govern the meaning of the words used. It is submitted, however, that in the cases where such *dicta* are used the decisions do not go so far. Nearly all of them might have been decided on the ground that the rule of *ejusdem generis* did not apply, for the simple reason that there was no *genus*. The persons or things specifically mentioned did not all belong to any definite class or kind. In this very case of *Anderson v. Anderson, supra*, the things specifically mentioned included furniture, plate, linen, glass, tenant’s fixtures, pictures, statuary, works of art and consumable goods. The general words following these were, “and other goods chattels and effects in or belonging to” the settlor’s house. Surely if the things here specifically mentioned belonged to any kind or class of things in particular, it was precisely the class described by the general words, and no other. At any rate the context here—which included a devise, to the same person, of the house itself—clearly showed that the words were to be taken in their widest meaning.

Of late there has been some reaction against this tendency to disregard the doctrine of *ejusdem generis*. In *In re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, is an example. There the words under consideration were “any cathedral, collegiate, chapter, or other schools” contained in s. 66 of the Charitable Trusts Act, 1853, and the question was whether “other schools” meant all other schools or only other schools more or less

like cathedral, collegiate, and chapter school. The court adopted the latter interpretation, and LINDLEY, M.R. (at p. 696), referring to *Anderson v. Anderson*, *supra*, treated the judgment of Lord ESHER, M.R., as not overruling the doctrine of *ejusdem generis*, but merely as a protest against its being pushed too far.

**Art. 2.**

Para. (1) (c).

In the case of wills, the inclination of the court is to disregard the rule where the effect of regarding it would be to cause a partial intestacy. Thus, the interpretation of general words following specific words, all describing things belonging to one class, depends very largely on whether or not they occur in what was intended to be a residuary clause. If they do, they are taken in the larger meaning (*Parker v. Marchant* (1842), 1 Y. & C. C. 290). If they do not, and taking them in the larger sense would make the clause residuary, they are read *ejusdem generis* (*Smith v. Davis* (1866), 14 W. R. 942; *Campbell v. McGrain* (1875), 1 R. 9 Eq. 397).

Cases where the application of the doctrine of *ejusdem generis* would cause partial intestacy.

So far as individuals are concerned, this rule seldom finds any application in wills or deeds. It is, however, often applied in construing statutes. Thus, in the Lord's Day Act (29 Car. 2, c. 7) it is enacted that "no tradesman artificer workman labourer or other person whatsoever shall do or exercise any worldly labour business or work of their ordinary callings upon the Lord's Day" : — *Held*, that "other person whatsoever" here means only other persons following callings similar to those specifically described, and therefore does not include a farmer (*R. v. Cleworth* (1864), 4 B. & S. 927) or a coach proprietor (*Sandiman v. Breach* (1827), 7 B. & C. 96).

Doctrine of *ejusdem generis* applied to individuals.

As to the subject matter of gifts, see *Re Miller, Daniel v. Daniel* (1889), 61 L. T. 365. There a testator, after giving the following legacies, to D. £100., to A. the books and wine at his residence, to T. all the plate at his residence, made these bequests : "All the rest of the furniture and

Applied to things : "Effects" cut down by application of the doctrine.

**Art. 2.** effects” at his residence to D. aforesaid, and “the rest residue and remainder” of his “estate and effects whatsoever and wheresoever” to T. aforesaid. On the testator’s death there were found at his residence £2,740 in bank notes, a post bill, a dividend warrant, and certain certificates for shares:—*Held*, that “effects” must be construed *ejusdem generis* with books, wine, plate and furniture, and therefore not to include the bank notes, post bill, dividend warrant and certificates (and see *Re Parrott* (1885), 53 L. T. 12; *Lambourn v. McLellan*, [1903] 2 Ch. 268, and *MacPhail v. Phillips*, [1904] 1 L. R. 155).

“Hereditaments” similarly cut down.

In *Crompton v. Jarratt* (1885), 30 Ch. D. 298, a settlor by deed of settlement conveyed “all and singular the manors messuages farm lands hereditaments and premises comprised and described in the Schedule hereunder written and all other the freehold hereditaments of him the said (settlor) situate in the several parishes of Doncaster Warmworth and Cantley in the county of York together with their appurtenances.” The Schedule enumerated all the settlor’s lands and other corporeal hereditaments in these parishes, but did not refer to an advowson in gross which belonged to him, and which concerned a church and glebe in one of the parishes mentioned in the settlement:—*Held*, that though, if there was nothing else to satisfy the words of the settlement, then the advowson might pass under them, yet as there were hereditaments situate in these parishes which aptly fitted the words, an advowson which properly speaking could not be said to be “situate” anywhere would not pass. In delivering judgment, COTTON, L.J., said (at p. 316), “Although it is true . . . that words of general description like this are used in order to carry into the assurance anything which by accident has been omitted, yet, in my opinion, they must, *prima facie*, be held to include only things that are of the same class and nature as those which have been specifically described

and enumerated." See this case distinguished in *Re Hodyson, Taylor v. Hodyson*, [1898] 2 Ch. 545. **Art. 2.**

Para. (1) (c).

Again in *In re Castlehow, Lamondy v. Carter*, [1903] 1 Ch. 352, a testatrix empowered her trustees to invest the trust funds in any of the public funds, or in Government or real or leasehold securities, or upon the stock, shares or securities of any railway or other "public company":—*Held*, that taking the words "public company" along with those preceding them, public company must be held to apply only to public companies in the United Kingdom. *Cf. In re Stanley, Tennant v. Stanley* (1905), 75 L. J. Ch. 56. "Public company."

For an application of the doctrine of *ejusdem generis* to the interpretation of powers of attorney, see *Jacobs v. Morris*, [1902] 1 Ch. 816.

The proviso to the rule may best be stated in the words of WILLES, J., in *Fenrick v. Schmalz* (1868), 3 C. P. 313, at p. 315: "That case (*R. v. Payne* (1866), 1 C. C. 27) falls within the rule that if the particular words exhaust the whole *genus*, the general word must refer to some larger *genus*." Proviso to the *ejusdem generis* rule.

#### PARAGRAPH (1) (f).

Generally speaking the interpretation put upon a deed or will by persons acting under it, as shown by their acts, is not relevant to the legal interpretation of the deed or will (*Clyde Navigation Trustees v. Laird* (1883), 8 App. Cas. 658). An exception, however, to this rule occurs in the case of ancient instruments which are, or have by time, become ambiguous in their terms (see *Lord Hastings v. North Eastern Railway*, [1899] 1 Ch. 656, at p. 663; affirmed [1900] A. C. 260). With regard to these, the court will permit evidence of the acts done by persons acting under their provisions to solve ambiguities. In the words of STOKES, C., in *Att.-Gen. v. Drummond*

Obscure words in ancient documents which have been acted on in a particular sense.

**Art. 2.** (1842), 1 Dr. & War. 353, at p. 368, "One of the most settled rules of law for the construction of ambiguities in an ancient instrument is, that you may resort to contemporaneous usage to ascertain the meaning of the deed: tell me what you have done under such a deed, and I will tell you what the deed means." Thus the mode in which the original donor of trust funds acted in administering them, was held to be evidence to aid the court in construing the trust deed (*Att.-Gen. v. Brasenose College* (1834), 2 Cl. & F. 295, at p. 326).

Evidence  
of ancient  
usage.

This evidence is what is called evidence of ancient usage. But uncontradicted evidence of modern usage is also evidence to aid the court in construing ambiguities or obscurities in ancient instruments (*per* PARKE, B., in *Beaufort v. Swansea (Mayor of)* (1849), 3 Ex. 413, at p. 425). Thus in *Healy v. Thorne* (1870), Ir. R. 4 C. L. 495, evidence of usage during the eighty years preceding was admitted to aid in construing a grant by King James I.

Usage must  
have been  
uniform.

The usage proved, must be the uniform usage, though a temporary lapse from it will not make evidence of it inadmissible (*The Queen v. Archdall* (1838), 8 Ad. & El. 281, at p. 288); and the evidence is only admissible when the terms of the instrument are ambiguous or obscure. It will not be admitted to contradict what is clear and express (*Earl de la Warr v. Miles* (1881), 17 Ch. D. 535). "It is not to be disputed that, where the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old or obsolete or even imperfect expressions to be found in ancient documents. But the necessity must be apparent, the ambiguity must be found to be existing" (*per* BACON, V.-C., *ibid.*, at p. 573).

Illustration  
of evidence  
of ancient  
usage.

A testator, in 1641, left certain lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, "for the only use, education in pietie and learninge of foure of

the descendants of the brothers and sisters of my second wife or in default of such to their next poor kindred for the first, by the father's side for the second, by the mother's side and the lease of the said 'lands' to be at one third parte under the value to my said wife's kindred ever viz. brothers and sisters there and at Harrowe." The two colleges accepted the gift, and each had always required that those persons who claimed the benefit thereof should become members of the college and be educated there, and when there were no claimants, each college had appropriated a moiety of the rents to their own purposes. It was contended that this interpretation of the will was wrong; that the will constituted a trust of the lands for the purpose of educating certain of the testator's kindred, subject to the regulation and direction of the court:—*Held*, that the intention of the testator was that the education given was to be that provided by the colleges to which he had left the lands, and that, therefore, the colleges were carrying it out when they insisted on the claimants becoming members, and that the colleges were entitled to appropriate the income when no claimants appeared. In delivering judgment, Lord HATHERLEY, L.C., said, "I think the appellants are entitled to apply that principle of the court, which says, that if there be any ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time" (*Att.-Gen. v. Sidney Sussex College* (1869), 4 Ch. 722).

**Art. 2.**

Para. (1) (f).

In *Stammers v. Dixon* (1806), 7 East, 200, there was an ancient admission to copyhold in these terms "*tres areas panti*," and the question in dispute was whether the admission conveyed the whole interest in the land, or a right to enter upon the land and take the forcrope. Evidence showed that from time immemorial, the benefit

**Art. 2.** of the tenant under the grant had been confined to the taking the forecrop, and that every other benefit of the land had been enjoyed by the grantors, lords of the manor. It was held that the grant conveyed only the incorporeal hereditament. In delivering judgment, the court said (p. 207), "We must then construe the rights of the parties, however derived from ancient grants, consistently with the possession, and there will then exist a copyhold interest in the *prima tonsura* for the defendant, and every other freehold interest in the land for the plaintiff. But this, it is said, is inconsistent with the entries on the court rolls, which grant an interest in the soil to the tenant, and were evidence for the jury to show in what right the defendant claimed and took the forecrops. The admissions are to *tres acres prati*; but can it be said that the word *prati* is not open to receive any construction which will carry a less interest than the whole right to the soil? The judge thought, that if the usage in fact were that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the forecrop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment, and I think he was right in that opinion."

The rule applies equally to the interpretation of Acts of Parliament. Thus in *Corporation of Dublin v. Trinity College* (1903), 88 L. T. 305, the question was whether Trinity College was or ever had been liable to "grand jury cess." The answer depended on the interpretation of various old Irish Acts. Evidence was given that no grand jury cess had ever been levied. The court had held that this was to be taken into consideration in deciding what was the meaning of the ambiguous expressions in the Irish Acts. Lord HALSBURY, L.C., in moving the dismissal of the appeal from this decision, said, "The learned counsel have insisted that if the plain words of an Act of Parliament

impose a tax, no amount of omission to charge that tax or to insist upon it by the proper executive officer could control, or cut down, or override the force of the Act of Parliament itself. With that observation I entirely agree. I do not think that any amount of user would be enough to contradict the proper efficiency of an Act of Parliament; but the proposition must be that the language of the Act of Parliament is incapable of exposition otherwise than in the mode in which it must hit this or that subject of taxation. But . . . when you are dealing with the question what is the meaning of an Act of Parliament, or of certain words used in it, the question how these words were understood at the time when the Act was passed, or what was the sense in which at that time people would generally have understood them, is a very different question. To my mind, where there has been a user for some centuries in which a particular meaning has been attached to particular words it may well be that the true understanding of those words is exhibited by the continuous practice of those centuries. . . . It will not control it" (the meaning of the Act) "but in order to interpret the meaning when it is not plain, the user at the time or at a subsequent time, may well be brought in aid."

**Art. 2.**

Para. (1) (d).

## PARAGRAPH (2).

"It is now, I believe, universally admitted, that in construing a will, the rule is to read it in the ordinary grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended, or abridged, so as to avoid those consequences, but no further. . . . Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate

Striking out or supplying words where the general scheme of the document requires it;

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context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument" (*per* Lord WENSLEYDALE, in *Abbott v. Middleton* (1858), 7 H. L. Cas. 68, at p. 114. And see *per* STIRLING, L.J., in *In re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66, at p. 70).

"When the main purpose and intention of the testator are ascertained to the satisfaction of the court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified. And, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given, the court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared" (*per* Lord KINGSDOWN, in *Towns v. Wentworth* (1858), 11 Moo. P. C. C. 526).

"It is quite true, I am not to conjecture or guess at what might have been the intention of the parties; but I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction" (*per* Lord ST. LEONARDS: *Clayton v. Glengall* (1841), 1 Dr. & W. L. at p. 14).

But the general intention must be clearly expressed in order that the rule may be applied.

No indication of intention is, however, sufficient to induce the court to hold that a certain bequest has been made, unless, as a matter of fact, the bequest is made either expressly or by necessary implication in the will itself. The court cannot make a will for the testator. The only intentions of his which it can carry out are the intentions

either explicitly or impliedly expressed in the will. In the words of Lord HALSBURY, L.C., in *Seale v. Rawlins*, [1892] A. C. 342, at p. 343, "the difficulty which I have here is not in speculating upon what peradventure may, at some time or other, have been in the testator's mind; but I must find words which are absolute and express. I might be perfectly satisfied that he intended that this lady should have an estate of inheritance in this property. I might be satisfied that that was his intention otherwise than by the words of the will; but I should be compelled to come to the same conclusion as I do now, namely, that that intention is not sufficiently expressed. . . . The thing has not been done; and I am not aware of any authority which would lead your lordships to come to the conclusion that, because the testator had, at some time or other, the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed." And see *In re Bagot*, *Paton v. Ormerod*, [1893] 3 Ch. 348; *Murdoch v. Brass* (1905), 6 F. 841, *infra*, p. 59; and Art. 8, *infra*.

**Art. 2.**

Para. (2).

Necessary implication has been defined by Lord ELDBOX, in *Williamson v. Adam* (1812), 1 V. & B. 422, as meaning, Meaning of "necessary implication." not natural necessity, but so strong a possibility of intention, that a contrary intention cannot be supposed. This definition has been adopted by JAMES, L.J., in *Crook v. Hill* (1871), 6 Ch. 311, who simplifies it thus: "The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this

**Art. 2.** case so strong a probability of intention to include, or not  
 —————  
 Para. (2). to exclude the children in question, as that a contrary  
 intention cannot be supposed."

Illustra-  
 tions of  
 "necessary  
 implication."

In *Re Wroe, Firth v. Wilson* (1896), 74 L. T. 302, a testator made the following bequest: Subject to certain charges and legacies, he left his effects to trustees in trust to pay and divide them "equally amongst the children of my deceased father's brothers and sisters, and I desire that the child or children of any one of such brothers and sisters as may be dead shall take his, her, or their deceased parent's share." The court held that by clear implication what the testator meant to say, was not "the child or children of any one of such brothers and sisters as may be dead," but "the child or children of any one *child* of such brothers and sisters," etc., since under the will the brothers and sisters of the deceased father were to take nothing, and their children everything, the "share" that was referred to must be the share of a child of a brother or sister.

In *In re Bassett's Estate, Perkins v. Fladgate* (1872), 14 Eq. 54, the testatrix in "her last will and testament," after appointing an executor and giving various legacies, proceeded as follows: "After these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister M. P., without any power or control whatsoever of her husband" J. P., in case of her death, equally among her children:—*Held*, a good gift of the residue of, to M. P.

In *In re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496, a testator devised his real estate in strict settlement and then bequeathed certain heirlooms to trustees in trust to permit the same to be enjoyed with the realty so far as the rules of law and equity would permit, by the persons who for the time being should be entitled to the possession of the realty by virtue of the will, yet so that the heirlooms should not vest absolutely in a son "or" any person thereby made tenant for life of the realty unless such son "or"

other person attained the age of twenty-one years:—*Held*, that to carry out the obvious intention of the testator the word “or” must be read “of.”

**Art. 2.**

Para. (2).

In *Mellor v. Daintree* (1886), 33 Ch. D. 198, a testator left his estate upon the following trusts: As to one moiety of it for the accumulation of the income until twenty-one years after the testator's death or until B. should reach the age of twenty-five or die, whichever event should happen first: and if the twenty-one years expired before B. attained the age of twenty-five then, if B. were living, the income was to be paid to B. till he attained the age of twenty-five or died, and on attaining that age the moiety was to go to him absolutely, and if he died before attaining that age, leaving a son him surviving, it was to vest in the son. As to the other moiety the income was to be accumulated during twenty-one years after the testator's death, or until D. should attain the age of twenty-five or die, whichever event should first happen, and if the twenty-one years expired before D. attained the age of twenty-five then the income was to be paid to D. till he attained that age, and if he died before that age, leaving a son, the moiety was to vest in the son:—*Held*, that the whole scheme and intention of the will showed that it was the testator's intention to vest the second moiety in D. absolutely on his attaining the age of twenty-five and that such a gift must be read into the will. And see *In re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133.

A testator devised an estate called Lea Knowl in trust for his daughter A. and her children on certain limitations, and gave the trustees power to sell and hold the proceeds on the same trusts as thereinbefore declared “concerning the said Lea Knowl estate.” He devised an estate called Croxton to his daughter B. and her children on certain limitations, and gave the trustees power to sell and hold the proceeds on the same trusts as thereinbefore declared “concerning the said Lea Knowl estate”:—*Held*, that on

**Art. 2.**

Para. [2].

the obvious construction of the deed the testator intended that the proceeds of the sale of the Croxton estate should be held on the same trusts as were declared of that estate and not the Lea Knowl estate, and that the words Lea Knowl in the second devise were inserted by mistake and should be deleted (*In re Northens Estate*, Salt v. Pym (1884), 28 Ch. D. 153). Cf. *In re Birks*, Kenyon v. Birks, [1900] 1 Ch. 417; see *supra*; and *Cowen v. Truefitt, Limited*, [1899] 2 Ch. 309, *infra*, p. 57.

It is to be remembered that ambiguous words of gift in a deed (*In re Michell's Trusts* (1878), 9 Ch. D. 5) or will may always be explained and interpreted by a clear recital. And in the case of a will a recital in a codicil may equally be referred to to explain ambiguous words of gift in the body of the will. Thus in *In re Venn*, Lindon v. Ingram, [1904] 2 Ch. 52, the question was in what shares a testatrix intended her estate to be given. JOYCE, J., in delivering judgment, said (p. 55): "I admit that in the will alone there is an ambiguity as to this, and that it is arguable that the testatrix intended the division to be in moieties. If, however, I may refer to the first codicil to clear up the ambiguity, there is no doubt but that the estate is to be divided equally among all the beneficiaries. If there were an obviously erroneous recital of the will in the codicil, that would not alter the construction of the will (see *Skerratt v. Oakley* (1798), 7 T. R. 492); but if the recital of the will in the codicil be not obviously erroneous, I have no doubt but I may refer to the codicil to clear up an ambiguity in the will. The principal authority for this is *Darley v. Martin* (1853), 13 C. B. 683." In that case JERVIS, C.J., pointed out that a will and codicil constitute together one instrument, and are to be read as one.

## PARAGRAPH (3).

Intrinsic and  
extrinsic  
evidence.

The evidence supplied by the will or deed as to the sense in which words are used is sometimes called intrinsic

evidence of meaning : the evidence supplied by facts outside the will or deed, extrinsic evidence of meaning. As both these kinds of evidence, when admitted as to circumstances set out in Article 2, affect the meaning of the words used, they are properly, and indeed necessarily, regarded as principles of construction, and therefore must be considered here. But other extrinsic evidence is sometimes admissible which, since its object is not to assist to interpret the words used in the instrument, but to add to the instrument or vary it, has, strictly speaking, nothing to do with the principles of construction : all it has to do with is to ascertain facts with respect to the instrument which is to be construed ; but as in many ways such evidence is much akin to evidence admitted to explain the meaning of words used, a short reference may be made to it here.

**Art. 2.**

Para. (3).

Generally speaking, extrinsic evidence of the circumstances under which an instrument was executed is admissible to prove some fact that will affect its operation or that will raise a presumption that it was made subject to a special custom or particular understanding, or which will rebut such a presumption or a presumption raised by the law itself, or which will show that the instrument was made under circumstances which rendered it void or voidable.

First, then, as to evidence of facts that will affect an instrument's operation.

The date of execution, where the instrument bears none, may be proved ; and even where it does bear one, evidence may be given to show that it is an erroneous or impossible one (*Goddard's Case* (1585), 2 Rep. 4 b). The ground of this decision is, that the time when the deed or will was executed is no part of the deed or will. But if the date in question is not the date of execution, but the date of operation, it cannot be proved. Thus, in a demise where the present tense is used, the court, in the absence of any

Evidence of  
surrounding  
circum-  
stances  
affecting  
operation.

**Art. 2.****Para. (3).**

date from which the lease is to operate, presumes that it operates from execution, while, on the other hand, an agreement for a future demise, where no date is stated for the commencement of the intended lease, the agreement is bad for uncertainty (*Marshall v. Berridge* (1881), 19 Ch. D. 233). Again, it may be shown whether any alterations appearing on the face of the instrument, or endorsements on it, were made before or after execution (*Thomson v. Batcher* (1625), 3 Buls. 300). In the same way, when an instrument purports to incorporate other documents by reference, the fact that these other documents were or were not in existence when the instrument was executed and the identity of the documents with those incorporated may, and (in the case of wills at any rate) must, be proved (*Singleton v. Tomlinson* (1878), 3 App. Cas. 404). And it may be proved that a deed contains only part of the agreement or transaction and that another contemporaneous parol contract exists referring to the same subject-matter (*Erskine v. Adeane* (1873), 8 Ch. 756). In the latter case, where the whole transaction is contained in two or more written instruments, all these instruments are to be construed together as one document (*Smith v. Chadwick* (1882), 20 Ch. D. 62).

If no consideration is set out in the deed, it may be shown that valuable consideration was actually given : and if a consideration is set out, it may be shown that another consideration was given in addition to that set out, provided this is not contrary to any statement in the deed (*Clifford v. Turrell* (1841), 1 Y. & C. C. C. 138, at p. 149). Thus, where no consideration was set out in a settlement, evidence was admitted to prove that the settlement was made in consideration of marriage (*Ferrars v. Cherry* (1700), 2 Vern. 383). And when the instrument in question is a will, a consideration for making the will can be proved, even if that is inconsistent with the will, since the party giving the consideration for the testator's

promise to make his will in a certain way is not a party to the will, and, therefore, is not estopped by any recital contained in it, as far as the bargain between him and the testator is concerned. Proof of consideration, however, both in the case of deeds and wills, arises more frequently in connection with the validity than in connection with the construction of the instrument.

**Art. 2.**

Para. (3).

In the second place, extrinsic evidence may be given to raise a presumption of fact that a deed was made subject to a special custom. As we have already seen, special custom may attach a meaning to the words used in a deed or will different from that which they ordinarily bear (*supra*, p. 19). In the same way, it may introduce provisions into an instrument other than those expressed in it, and extrinsic evidence may be given to show that the instrument in question was made subject to a special custom, and that by the special custom the provisions in question were implied. Sometimes, however, special customs are taken cognizance of by the court without evidence to prove them. See *supra*, p. 20.

Evidence  
of special  
custom  
admissible.

In order that a custom should be recognised by the court, it must be consistent with the express provisions of the instrument, and must also be reasonable (*Wigglesworth v. Dullison* (1779), 1 Doug. 201; 1 Sm. L. C. 528).

Special custom cannot import provisions into a will, since, by the Wills Act, all the provisions of the will must be in writing. It affects few deeds except leases of agricultural land (which are usually made subject to local customs) and commercial instruments (which are usually made subject to the customs of the trade). See *North v. Bassett*, [1892] 1 Q. B. 333.

A., a building owner, appointed B. to take out the quantities as to certain contemplated works. C. afterwards tendered for the contract to build the works in

Illustrations  
of evidence  
of special  
custom.

**Art. 2.**

Para. (3).

question, and based his tender on the quantities as supplied by B. C.'s tender was accepted. The building contract made no provision for the payment of B.'s charges for taking out the quantities. B. sued C. for these charges, and, at the trial, proved that it was the custom of the building trade that if a tender based on the quantities was accepted, the builder whose tender was accepted was liable for the quantity surveyor's charges; but if no tender was accepted the building owner was liable:—*Held*, that the custom proved was reasonable, and that C. was liable for B.'s charges (*North v. Bassett*, [1892] 1 Q. B. 333).

Agricultural  
customs.

In a lease A. was tenant of a farm under a written agreement, in which there was a reservation to the lessor of "all mines and minerals, sand, quarries of stone, brick, earth and gravel pits." By a local custom, tenants of agricultural land were entitled to take all flints turned up in the ordinary course of agriculture, and sell them for their own benefit, and it was shown that the removal of such flints was necessary for the proper cultivation of the soil:—*Held*, that the custom was reasonable and valid, and that it was not inconsistent with the reservations in this agreement, and therefore was to be read into the agreement (*Tucker v. Linger* (1882), 21 Ch. D. 18; (1883), 8 App. Cas. 508).

As to extrinsic evidence to raise the presumption of fact that the instrument was subject to a particular understanding, see Part III., Chap. I.

Extrinsic  
evidence to  
rebut pre-  
sumptions.

Once a presumption of fact is raised, whether by the admission of extrinsic evidence or by the law itself, extrinsic evidence is always admissible to rebut it (*In re Bacon's Will*, *Camp v. Coe* (1886), 31 Ch. D. 460).

Two kinds of  
presumption.

Presumptions raised by law are of two kinds; first, presumptions which—like those raised by extrinsic evidence—add to or vary, but do not contradict the instrument; and secondly, presumptions which do contradict it by imputing

to the parties to the instrument an intention different from that which appears on the face of the deed. Examples of the first kind occur in the case of grants of land abutting on a highway when there is a presumption that half the soil of the highway passes under the grant, though there is nothing as to that expressed in the deed.

**Art. 2.**

Para. (3).

Presumptions of the second kind are more numerous. they arise most frequently in equity. Thus, where purchases are made in the names of third persons, there is a presumption in equity that the third person is not to be benefited but is to hold the land in trust for the purchaser. And where a portion has been advanced to a child during its parent's life, there is a presumption that a portion given by the parent's will is not intended as a second or double portion. These presumptions, however, have nothing to do with construction of deeds. They are not intended to solve any difficulty arising as to the meaning of the words used in it. But the presumption against double gifts is really a presumption of construction which only differs from a rule of construction in this, that direct evidence of what was actually intended by the testator or parties may be given to show that it is inapplicable.

Legal presumptions contradicting words of instrument.

The case of *In re Bacon's Will*, *Camp v. Coe* (1886), 31 Ch. D. 460, is a peculiar example of admission of extrinsic evidence to rebut a presumption arising on the construction of a will. The testatrix by her will, which was made on a printed form, after directing that all her debts and testamentary expenses should be paid by her executor, simply appointed defendant executor without filling up the blanks in the form following the printed words "I give, devise and bequeath all —." The testatrix left no next-of-kin, and therefore, as against the Crown, the executor was entitled to the residue of the assets (1 Will. 4, c. 40, applying only as between executors and next-of-kin), unless the Crown could show that the

Evidence to rebut presumption arising in a will.

**Art. 2.**  
**Para. (3).**

testatrix intended the executor should not take. It was contended for the Crown that the existence of the words "I give," etc., showed such an intention, and as such intention appeared on the face of the will, no extrinsic evidence was admissible to rebut it. The court held that under the peculiar circumstances these words only give rise to a presumption, and that such presumption might be rebutted by extrinsic evidence.

Extrinsic  
 evidence to  
 avoid instru-  
 ment.

Lastly, evidence of the circumstances under which the will or deed was made is admissible to show that the instrument is void or voidable. Thus, evidence that the execution was induced by fraud or duress, or that the consideration given was illegal or unusual, or that the maker was under such disability as would in law prevent him validly executing the instruments, or that a donee had agreed to hold the gift in trust for some person or purpose, will, of course, be in all cases admitted. This evidence has, if possible, less to do with construction than that admitted under the preceding rules. Its real point is not to help the court to construe the instrument, but to help it to ascertain whether there is any legal instrument to construe, or what, notwithstanding the instrument, was the true nature of the transaction.

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**ART. 3.—*Direct extrinsic Evidence of Intention.***

In construing a will or deed, the court will not admit direct extrinsic evidence of the intention of the testator or parties, for the purpose of assisting it to ascertain the sense in which the words were used, save when after construing the instrument in accordance with the rules laid down in the preceding articles, an equivocation has arisen. Such evidence will then be admitted to resolve the equivocation.

An equivocation arises where there are words in the instrument which, though applicable to one person or thing only, may be applied with complete accuracy, or, subject to the same inaccuracy, to two or more persons or things indifferently. Art. 3.

The evidence admissible under this article is called Direct extrinsic evidence of intention. extrinsic evidence of intention, to distinguish it from the evidence of intention which may be gathered from the words of the instrument, and it is called direct extrinsic evidence to distinguish it from the extrinsic evidence admissible under Article 2, which is all of it indirect evidence of intention, that is, evidence arising from the circumstances surrounding the transaction which goes to show what the intention was. Here, direct extrinsic evidence of intention means evidence of what the testator expressed to be his intention in some other way than by his will.

"There is but one case in which it appears to us that Equivocation. this sort of evidence (*i.e.*, evidence of the testator's actual intentions) can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous or obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord BACON calls 'an equivocation,' *i.e.*, the words apply equally to either manor, and evidence of previous intention may be received to solve what he meant to do; and when you know that, you immediately perceive that he has done it by the general

## Art. 3.

words he has used, which, in the ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded upon this plain ground, that his will ought to be in writing; and if his intention cannot be made to appear by the writing explained by circumstances there is no will" (*per* Lord ABINGER, C.B. : *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, at p. 368 : Tud. Lead. Cas. 489 : and see also *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866).

This doctrine was carried very far in the case of *In re the Estate of Hubback*, [1905] P. 129. There a testatrix devised and bequeathed all her property to "my grand-daughter . . ." The testatrix had at the date of her will three grand-daughters. Direct extrinsic evidence was admitted to show which of the grand-daughters the testatrix intended, and so fill up the blank left in the will. The reasons given for this decision were these : The case was not like that of a total blank. Here there was a description of the intended beneficiary—"my grand-daughter." If there had been only one grand-daughter this would have been an ample description. There being three, there was a true equivocation, and direct evidence of intention might be given to solve it. *Sed quare*. It would seem to be quite as reasonable to hold that the will was incomplete, and filling up the blank by means of extrinsic evidence was not interpreting the will at all, but in effect completing the will for the testatrix. And further, where there are a number of grand-daughters, is "my grand-daughter" a specific description of anyone, any more than, say, "my friend" is ?

Explanation  
of the rule  
as to equivoca-  
tions.

It is to be noted that an equivocation arises only when the words apply accurately or subject to the same inaccuracy to two or more persons or things. Strictly speaking, when they apply, subject to the same inaccuracy, the equivocation does not arise until the court decides to reject the inaccurate part as *falsa demonstratio*. Then, as the

## Art. 3.

remaining part applies accurately to the persons or things in question, there is a true equivocation. Thus, a legacy is left to "Robert Careless, my nephew, son of Joseph Careless." The testator had no brother named Joseph, but had two nephews called Robert Careless. The court rejected the word Joseph. Both nephews were then accurately described by what remained, "Robert Careless, my nephew, son of        Careless." Evidence of the testator's intention was then admitted to show which of the nephews, called Robert Careless, the testator referred to in the will (*Careless v. Careless* (1816), 1 Mer. 384). And see as to descriptions of things referred to in a contract for works, *Bank of New Zealand v. Simpson*, [1900] A. C. 182. Cf. *In re Wolverton Mortgaged Estates* (1877), 7 Ch. D. 197.

In the next place, when the description applies only inaccurately to the persons or things in question, the inaccuracy with which it applies to each must be the same—that is, one part of it must not apply to one person or thing, and another part of it to the other person or thing. When the inaccuracy is not a common one which may be rejected, leaving all the rest of the description applicable equally to both or all the persons or things, there is no equivocation, and the grant or gift will fail for uncertainty if, after applying all the previous rules of construction, there is nothing to indicate which person or thing of those to which the description generally applied, was intended. Thus, in *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, the testator devised certain lands to his son John Hiscocks for life, and on his death to *his* eldest son John Hiscocks for life, and on his decease to *his* eldest son in tail. At the date of the will John Hiscocks, who took the first life estate, had been twice married, and had a son called Simon by the first wife, and a son called John by the second wife. Accordingly, the description in the will of the devisee who was to take the second life estate applied inaccurately to both Simon and John, but not

Cases where equivocation applies with equal inaccuracy.

**Art. 3.**

subject to the same inaccuracy: *Held*, that extrinsic evidence of the testator's intentions, as shown by the instructions he gave for his will, was not admissible. And see *In re Ingle's Trusts* (1871), 11 Eq. 578; *Charter v. Charter* (1874), L. R. 7 H. L. 364, *supra*, p. 17, and *Henderson v. Henderson*, [1905] 1 L. R. 353.

In absence  
of extrinsic  
evidence an  
equivocal  
gift fails  
altogether.

If a true equivocation arises, the gift must fail for uncertainty, unless there is evidence of intention produced to solve the equivocation. Thus, in *In re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, a testator left the residue of his property "unto the children of the deceased son (named Bamber) of my father's sister, share and share alike." There were three deceased sons named Bamber of the testator's father's sister, to the knowledge of the testator. No extrinsic evidence of intention was offered. The court held, that as the description here was equivocal, applying, as it did, equally to the children of three different persons, extrinsic evidence would be admissible to show which were intended: but, in the absence of such evidence, the gift was void for uncertainty.

Failure for  
uncertainty  
as to prop-  
erty given.

It would seem that at one time it was considered doubtful whether this rule applied to gifts. Where a testator gave, say, a house or a horse to a legatee, and it turned out that he had several houses or several horses, it was contended that the legatee had the right to choose which house or which horse he pleased. This is undoubtedly the rule where the testator is not shown to have intended to give a particular thing. In such a case there is no equivocation. Thus, if a man has four houses and he devises one to A., another to B., a third to C., and the fourth to D., A. is entitled to first choice, B. to second, C. to third, and D. to fourth (*per* ROMER, J., in *Asten v. Asten*, [1894] 3 Ch. 260, at p. 263). A true equivocation arises only when a testator intending to give a particular thing describes it in such a way that the description applies equally correctly to several different things. Then

## Art. 3.

if there is no extrinsic evidence to show which thing he really intended, the gift fails for uncertainty. Thus, in *Asten v. Asten*, *supra*, a testator had four houses in Sudeley Place, Colchester. At the date of his will these houses had not been numbered, and a piece of land in their rear belonging to the testator had not been divided up between them. By his will the testator left to each son and his heirs one of those houses described in each case in this way: "To my son                      and his heirs All that newly built house being No.                      Sudeley Place with the piece of ground in the rear thereof abutting upon Rawstom Road":—*Held*, that as it was clear that the testator intended to give each son a particular house, and that there was no evidence to show which house was intended to be taken by each son respectively, the devise must fail. *Cf. Tapley v. Eagleton* (1879), 12 Ch. D. 683, where there was a devise of no particular houses, *i.e.*, simply "two houses," and the devisee was held entitled to select, and *Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620, *infra*, p. 52, where there was intrinsic evidence to identify the property given.

Owing to the rule that relationship means primarily legitimate relationship, it often happens that a description which, between relatives either both legitimate or both illegitimate would be equivocal, is not equivocal as between relatives one of whom is legitimate and the other illegitimate. Accordingly, under such a description the legitimate relative is entitled to take, and evidence will not be admitted to show that the illegitimate relative was intended. Thus, in *La re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83, a testator by his will left the ultimate residue of his realty and personalty upon his wife's death to "my niece, E. W." Neither the testator nor his wife had a niece, but the wife had two grandnieces, both called E. W., one of whom was legitimate and the other illegitimate. There was nothing in the will to indicate that the

No equivocation between legitimate and illegitimate relatives of the same degree and name.

**Art. 3.**

term was intended to include an illegitimate grandniece. Evidence was offered to show that the illegitimate grandniece was the one intended to take; but the court refused to admit it, holding that the description applied more aptly to the legitimate grandniece, and therefore evidence of the testator's intention was not admissible.

If, however, it appears from the language of the will itself that the testator used the term as applying to natural as well as legitimate relationship, then the description is no longer primarily applicable to legitimate relationship, and an equivocation may arise under such a description as that given in the preceding illustration (*In the Goods of Ashton*, [1892] P. 83).

Extrinsic evidence as to equivocation is restricted to evidence as to which party or thing was intended, and is not admissible to show that both or neither were.

Lastly, where there is an equivocation, extrinsic evidence of the actual intention of the testator (or of the parties) is admissible only to show which of the persons or things to which it is applicable was intended. Evidence to show that both or all were intended when the words of the will or deed refer to merely a single person or thing, would be evidence not to solve the equivocation, but to vary the intention expressed in the instrument, and as such would be clearly inadmissible (*Richardson v. Watson* (1833), 4 B. & Ad. 787).

**ART. 4.—Court favours the Construction most Beneficial to the Grantee or Beneficiary.**

Where the maker has received valuable consideration for making a deed, or where a will discloses an intention of bounty towards any person, where a document may operate to cause a forfeiture, then if two or more constructions of the deed or will are equally possible, that construction is to be preferred which, in

the case of the deed is most advantageous to the person who gave the consideration, and in the case of the will is most advantageous to the person towards whom there is disclosed an intention of bounty, and in the case of the document may prevent a forfeiture. **Art. 4.**

“ It is certainly true that the words of a covenant are to be taken most strongly against the covenantor, but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument ” ( *per* Lord ELDON, L.C., in *Browning v. Wright* (1799), 2 B. & P. 13, at p. 22). Cases bearing on the rule.

This rule has been strongly dissented from by JESSEL, M.R., in *Taylor v. Corporation of St. Helens* (1877), 6 Ch. D. 264 : “ As regards the maxim . . . that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor, I do not see how, according to the now established rules of construction, as settled by the House in the well-known case of *Grey v. Pearson* (1857), 6 H. L. Cas. 61, followed by *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823, and *Abbott v. Middleton* (1858), 7 H. L. Cas. 68, that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument, according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled ” (*ibid.*, at p. 279). Opinion of JESSEL, M.R., *contra*.

It is submitted, however, that there are cases where, after applying the ordinary rules of construction, two meanings are equally possible, and yet the instrument is

**Art. 4.** not void for uncertainty. And it is just in such cases that this maxim applies.

Opinion of  
Lord SEL-  
BORNE as to  
same rule.

At the same time the maxim can hardly be considered a correct or at any rate full statement of the rule applicable to deeds. In the first place, it is submitted that the maxim should be limited to grants for value. This limitation is put upon it by Lord SELBORNE, L.C., in *Neill v. Duke of Devonshire* (1882), 8 App. Cas. 135, at p. 149. "It is well settled," he says, "that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee." In the second place, the true rule is not that the words of the deed should be construed most strongly against the grantor, but that they should be construed "as far as they properly may, in favour of the grantee," which may be a very different thing.

Exception.

An exception to this rule is said to occur in the case of grants by the king. In such cases the instrument of grant is to be construed, not in favour of the grantee, but in favour of the grantor—that is, the king. See *R. v. Northumberland: The case of Mines* (1569), Plowd. 310.

Illustration  
of rule.

In *Manchester College v. Trafford* (1679), 2 Show. 31, in a lease for twenty-one years, there was a covenant by the lessor that the lessee should have the land for twenty-one years more after the expiration of the said term, and "so from twenty-one years to twenty-one years until ninety-nine years past thence next ensuing shall be complete and ended." A question arose whether the period of ninety-nine years was to begin from the commencement or end of the original term of twenty-one years; and, on the principle that a grant should be most strongly construed against the grantor, the court held that it began from the determination of the original term.

How far  
applicable  
to wills.

When, as sometimes happens, a will is made for valuable consideration, no doubt, in construing it, the

Art. 4.  

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court would regard it as a contract, and construe it in the mode most beneficial to the devisee or legatee who gave the consideration. In other cases, before construing a doubtful clause in favour of the devisee or legatee, the court looks for an "intention of bounty." If it is clear from the whole document that the testator intended to benefit the devisee or legatee, then doubtful words will be read in the sense which best carries out this intention. Thus, in *Re Rowe, Pike v. Hamlyn*, [1898] 1 Ch. 153, the testatrix, who was sole devisee and legatee under her late husband's will, bequeathed to her grandniece £300 "in addition to the sums owing to her from my late husband's estate." There was nothing owing to the grandniece from that estate, but the testatrix's husband had, as the testatrix knew, given the grandniece a promissory note and an I. O. U. for two sums amounting together to £500. These instruments, however, were not legally enforceable against the grantor's estate as they were given without consideration. The testatrix's will contained no direction to pay debts:—*Held*, that read in the light of surrounding circumstances, the will disclosed an intention of bounty, and that accordingly there was a gift by implication of the two sums referred to in the I. O. U. and promissory note. And see *Craven and Harvey-Bathurst v. Errington* (1877), 37 L. T. 338, at p. 340.

Another example of the application of this rule arises in the case of general as opposed to specific legacies of things of which the testator has more than one. Where this happens the legatee has the right to select from the several things which one he pleases. See *supra*, p. 46. Two recent cases may be cited in illustration of this right to select.

In *O'Donnell v. Walsh*, [1903] 1 I. R. 115, a testator left "twenty Northern Bank shares" to a legatee. At the date of his death he owned fifty-one "A" Northern Bank shares value £26 each, and seventy-two "B"

**Art. 4** Northern Bank shares value £13 each. The court held that, it being plain on the will itself that there must be a selection made in order to carry out the intention of the testator, it was the right of the legatee to make it, and the legatee in this case being a minor, the court approved the selection on her behalf of twenty of the "A" shares.

On the other hand, in *Re Cheadle, Bishop v. Holt*, [1900] 2 Ch. 620, a testatrix left a legatee "140 shares in the Crown Brewery Company." At the date of the will testatrix possessed 280 shares of £5 each, of which forty were fully paid up, and the remainder paid up to the extent of £2 10s. Direct extrinsic evidence of intention was tendered to show that the testatrix intended to leave the legatee 140 partly paid up shares. This was rejected as there was no equivocation: *Held*, however, that on the face of the will the legatee had no right of selection since the 280 partly paid up shares were the only shares testatrix possessed out of which the legacy of 140 shares could be fully satisfied, and there was nothing to show that testatrix intended the legacy to be satisfied partly out of one kind of shares and partly out of the other kind.

Application  
to forfeitures.

The rule is also applied for the purpose of preventing a forfeiture. Thus, in *Durran v. Durran* (1905), 91 L. T. 819, G. was entitled under a will to a life interest in the income of some settled funds, such interest being determinable if he should become bankrupt, or assign, charge or incur a debt, or attempt or affect to assign, charge or incur a debt the same or any part thereof. The testator's estate was administered by the court, and a receiver was appointed. G., on November 6th, 1902, wrote to the receiver as follows: "I am indebted to B. & Co. in the sum of £5 payable on January 15th next. Will you kindly deduct this sum from any moneys that may be found due to me in the passing of your accounts by the Court of Chancery on that date, and pay the same to

them?" It was admitted that the amount of arrears of income owing to G. in the receiver's hands at the time this letter was written exceeded £5:—*Held*, that the letter was ambiguous, and therefore it must be read as referring merely to the arrears of income. ROMER, L.J., said (at p. 821): "If such a document is capable of an innocent construction so as not to create a forfeiture, I think we ought so to construe it, unless the circumstances compel us to construe it otherwise." And see *Chapman v. Perkins*, [1905] A. C. 106.

Art. 4

And as to the leaning of the court to construe ambiguous conditions as conditions subsequent, see *In re Greenwood*, *Goodheart v. Woodhead*, [1903] 1 Ch. 749.

#### ART. 5.—*Repugnant Clauses.*

Where, after the preceding rules have been applied to construe a will or deed, there still remain two unambiguous clauses which are repugnant, then in the case of a will the last, and in the case of a deed the first, will prevail.

"The general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail" (*per* MANSFIELD, C.J. : *Doe d. Leicester v. Briggs* (1809), 2 Taunt. 109, at p. 113).

Dictum of  
Lord MANS-  
FIELD.

It is to be noted that this rule of construction comes into operation only when the previous rules, having been applied, there has been found nothing to indicate which of the two contrary intentions was the real intention or the intention which the testator or party would have preferred, had his mind been called to the inconsistency between it and the other intention expressed. Or, in the words of JAMES, L.J., in *In re Bywater*, *Bywater v. Clarke* (1881), 18 Ch. D. 17, at p. 24, the rule is to prevail only "if a judge can find nothing else to assist him in determining

Explanation  
of rule.

**Art. 5.** the question.” In other words, this rule is subject to the rule laid down in Article 2, under which, when once the intention is ascertained, any expressions in the instrument inconsistent with that intention may be rejected.

Illustration  
as to deeds.

A not uncommon instance of the application of this rule arises in the case of an inconsistency appearing between the estate limited in the operative words of a deed of grant and that limited in the *habendum*. Now although the *habendum* is the proper place for limiting the estate granted (Shep. Touch. 74), at the same time if a different estate is limited in the operative words the court will hold that that estate is the one conveyed by the deed. The *habendum* may enlarge the estate limited or it may vary it if this can be done without contradicting the words of limitation in the operative words, but it cannot carry a smaller estate than that granted by them (*Kendal v. Micfeild* (1740), Barn. Chy. 46).

As to wills, see *Ulrich v. Litchfield* (1742), 2 Atk. 372 ; and *Morrall v. Sutton* (1844), 1 Ph. 533 ; *Biggar v. Eastwood* (1884), 15 L. R. Ir. 219.

#### ART. 6.—*Express and Implied Provisions.*

The expression in a will or deed, of that which if not expressed would be implied by law, has no effect. The expression of that which if not expressed, would not be implied by law excludes what would be so implied.

Authorities  
for rule.

*Expressio eorum quæ tacite insunt nihil operatur.*

Co. Litt. 205a.

*Designatio unius est exclusio alterius.*

*Semper expressum facit cessare tacitum.*

Co. Litt. 210a.

“ If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that

condition excludes the doing of the act authorised under other circumstances than those so defined" (*per* WILLES, J. : *North Stafford Steel Co. v. Ward* (1868), 3 Ex. 172, at p. 177). Art. 6.

The first part of the rule may be illustrated by the old case of *Sury v. Cole* (1625), Latch, 44. There, in a lease for years, the lessor reserved an annual rent to himself during his life, and to his assigns :—*Held*, that the latter words "to his assigns" had no operation since they were implied by law. Illustration of first part of rule.

As an illustration of the second part of the rule, see *Mathew v. Blackmore* (1857), 1 H. & N. 762. There, a trustee in a mortgage of trust lands covenanted to pay the mortgage debt out of the monies which came to his hands as trustee :—*Held*, that the personal liability to pay, which the law would imply in the absence of any covenant, was here rebutted by the express covenant to pay only out of the monies coming to the mortgagor's hands as trustee. Illustration of second part of rule.

A mere expression of part only of what the law would imply does not constitute, in itself, an expression of what the law would not imply, so as to substitute the part expressed for the whole of what would be implied. An actual intention to exclude the part not expressed must appear in order to accomplish this. Thus, where there was a grant in fee simple to D. of certain lands, A. granting unto D. and his heirs all the coal in them, with liberty to D. and his heirs "during the time that D. and his heirs should continue owners of F——, to sink pits," the court held, that since as owner in fee of the lands and minerals, the law gave D. the right to sink pits, the reservation of such a liberty, even though restricted as this liberty was, had no effect, and that D. and his heirs were entitled to sink pits in the lands granted, whether or not they remained owners of F. (*Cardigan v. Armitage* (1823), 2 B. & C. 197). Expression of part only of a legal presumption.

## Art. 7.

ART. 7. —*Rules as to "Falsa Demonstratio."*

Where on construing a will or deed in accordance with the rules laid down in the preceding articles, it is possible to identify the persons or property referred to therein, the provisions relating to such persons or property will be good, notwithstanding any errors in their description.

## Authorities.

"As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it" (*per* PARKE, B., in *Llewellyn v. Earl of Jersey* (1843), 11 M. & W. 183, at p. 189).

"One of the rules of construction is *falsa demonstratio non nocet*, which means that if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it" (*per* ALDERSON, B., in *Morrell v. Fisher* (1849), 4 Ex. 591, at p. 604).

"I must protest against the way in which the doctrine was stated by the appellant's counsel—that the maxim *falsa demonstratio non nocet* only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous; it is a misapprehension. I do not know that the principle can be better put than it is in *Jarman on Wills*, 5th ed., p. 742, where it is said the rule means 'that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject-matter with sufficient certainty, the untrue part will be rejected and will not vitiate the devise. The characteristic of cases within the rule is that the description so far as it is false, applies to no subject at all, and so far as it is true, to one only.'

. . . If the language is clear, but does not fit because of some words which have been inserted, then, if it is possible to reject the part that makes it inapplicable, the court will do so" (*per* LINDLEY, M.R., in *Cowen v. Truefitt, Limited*, [1899] 2 Ch. 309, at p. 311).

Art. 7.

As to rejecting a false and inapplicable part of description, see *supra*, pp. 31 *et seq.*, and *In re Vaughan* (1901), 17 T. L. R. 278.

In the above case of *Cowen v. Truefitt, Limited*, will be found a good illustration of the application of the doctrine of *falsa demonstratio*. The facts there were as follows: The defendants, who occupied Nos. 13 and 14, Old Bond Street, underleased the second floor rooms to the plaintiff. In the underlease these premises were demised "together with free ingress and egress for the lessee, her servants and customers, through the staircase and passages of No. 13 aforesaid, to and from the premises hereby demised on the second floor of the said messuages Nos. 13 and 14 aforesaid." As a matter of fact there was no staircase from the street through No. 13, in which, however, there was a lift, but there were two staircases through No. 14, a front and back one. The plaintiff claimed the right to go by the latter, on the ground that there was a mistake in the lease as to the number of the house in which the staircase was, and secondly, on the ground that on the true construction of the lease, she was entitled to ingress and egress by that staircase. The defendants counterclaimed for rectification of the lease, so as to limit her right to ingress and egress by the lift in No. 13. At the trial ([1898] 2 Ch. 551) ROMER, J., held, with hesitation, that on the true construction the lease should be read "together with free ingress and egress . . . through the staircase and passages," and that the words "of No. 13" should be rejected as *falsa demonstratio*, and decided in the plaintiff's favour, rejecting the defendants' counterclaim on the evidence. On appeal, the Lords

Illustration  
of rule.

**Art. 7.** Justices expressed grave doubts whether the doctrine of *falsa demonstratio* applied, since the words "staircase and passages" were hardly definite enough, there being two staircases in No. 14, and further, that the whole description referred to a non-existent thing—a staircase in No. 13. They were clearly of opinion, however, that there was a common mistake, and that what was intended to be included was a right of way over the back staircase of No. 14, and they rectified the indenture of lease to this effect.

An example of *falsa demonstratio* in the description of a person is that in *Anderson v. Berkley*, [1902] 1 Ch. 936. There a testator left the income of a fund to his son for life. "And from and after his death to pay such income to his wife Letitia during her life if she shall survive him." Prior to the will the son had migrated to New Zealand, and from there he had written to the testator that he had married Letitia Cumberland. He had not married her, but he was living with her, and she was his reputed wife:

*Held*, that as the person intended to take was identified by the name Letitia, the description was *falsa demonstratio* and might be rejected. And see *Re Hooper, Hooper v. Warner* (1903), 88 L. T. 160.

#### ART. 8.—*Failure for Uncertainty and Charities.*

(1.) Where after construing a will or deed in accordance with the rules laid down in the preceding articles, it is impossible to identify the persons or property referred to in such will or deed, then the provisions affecting such persons or property will fail for uncertainty.

(2.) Where a will or deed contains a gift for charitable purposes, such gift will not be allowed to fail for

uncertainty as to the object of such gift, where the will or deed discloses a general intention of charity—that is, an intention that the gift in any event shall be used for charitable purposes of some kind or other. Art. 8.

#### PARAGRAPH (1).

As examples of failure of gifts for uncertainty, see *Asten v. Asten*, [1894] 3 Ch. 260, *supra*, p. 46; *In re Stephenson*, *Donaldson v. Bamber*, [1897] 1 Ch. 75, *supra*, p. 46, etc.

In *In re Hetley*, *Hetley v. Hetley*, [1902] 2 Ch. 866, a testator by his will appointed his wife sole executrix. He then declared as follows: "I give devise and bequeath to her all my real and personal estate whatsoever and wheresoever for her use, enjoyment and benefit during her life. And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her"—*Held*, that under this gift the widow took no beneficial interest in the property of the testator, that subject to this life interest it was intended to give her a bare power of disposition over the *corpus* for certain purposes which did not appear on the face of the will, that extrinsic evidence was not admissible to prove such purposes, and that therefore the power of disposition failed for uncertainty.

In *Murdoch v. Brass* (1905), 6 F. 841, a testatrix left a will in these terms: "I            for the love I have for my husband, J. M., bequeath and leave everything which belongs to me or may belong to me at some future time." She then made some specific bequests:—*Held*, that owing to uncertainty, the gift intended by the above words failed. *See quare*.

As to the failure for uncertainty of precatory trusts, see *infra*, p. 171, and Underhill on Trusts, 6th ed., pp. 21—31.

**Art. 8.**

## Para. (2).

## PARAGRAPH (2).

The rule stated in paragraph 2 is rather a rule of policy than a rule of interpretation. In the public interests the court will, where it is possible, support a trust for a public or charitable purpose. As to what is in law a charitable purpose, see Strahan and Kenrick's Digest of Equity, pp. 160, 161.

A general intention of charity may be express or it may be implied. Where it is express, it may be too vague for the court to enforce it. Thus, in *Grimond v. Grimond*, [1905] A. C. 124, 630, a Scottish testator left property to his trustees to divide among such "charitable or religious institutions and societies" as they might select. In the court below there was much discussion as to whether these words were in fact sufficient to institute a charitable trust at all, since it does not necessarily follow that all religious purposes are charitable in the legal sense of the word. But ultimately the case was decided on the vagueness of the words used, whether "charitable" and "religious" were to be regarded as synonymous or not. As put by Lord HALSBURY, C.J. (at p. 126): "The testator had not given a class from which he allowed his trustees to select individually, but he had left directions so vague that it was in effect giving someone else power to make his will for him instead of making it himself." The House of Lords therefore held the gift void for uncertainty (*Cf. Arnott v. Arnott*, [1906] 1 L. R. 127).

Where, however, the charitable or public purposes of a gift are those in a specific locality, the gift is not void for uncertainty. Thus, in *In re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400, a testator left property in trust "for such charitable, educational or other institutions of the town of Kendal and also for such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as my said trustees shall in their absolute uncontrolled

discretion think fit":—*Held*, a good charitable trust (*Cf.* *In re White*, *White v. White*, [1893] 2 Ch. 41; *In re Hurttable*, *Hurttable v. Crawford*, [1902] 2 Ch. 793, *supra*).

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Para. (2).

Sometimes a gift fails for uncertainty through the description of the purposes of the trust being wide enough to include purposes not charitable, as it was contended was the case in *Grimond v. Grimond*, *supra*. Thus, in *In re Macduff*, *Macduff v. Macduff*, [1896] 2 Ch. 451, the objects of a gift were described as "charitable or philanthropic purposes," and it was held that as there are philanthropic purposes which are not charitable, and as there was no indication what part of the gift was to be devoted to these and which to charitable purposes, the whole gift failed for uncertainty. *Cf.* *In re Best*, *Jarris v. Corporation of Birmingham*, [1904] 2 Ch. 354, where the words "charitable and benevolent institutions" were held to be sufficiently definite to support the gift. Where purposes other than charitable may be included in the words used in the gift, if a discretion is given to the trustees as to what part of the trust fund is to be devoted to each purpose, whether the trustees exercise such discretion or not, the trust as far as the charitable purposes are concerned will not fail for uncertainty, since in case the trustees do not exercise the discretion the court will apportion the trust fund equally between the charitable and the other purposes (*Salisbury v. Denton* (1857), 3 K. & J. 529).

The court has adopted some rules which are not over precise as to when a general intention of charity will and will not be implied. Where a gift is left to a specific charity which has ceased to exist before the death of the testator, no general intention of charity will be implied, and the gift will fail (*In re Rymer*, *Rymer v. Stanfield*, [1895] 1 Ch. 49). But where the specific charity survives the testator, but the benefit cannot be carried out precisely in the same mode as the testator intended,

**Art. 8.**

—  
 Para. (2).

or even (perhaps) at all (but see *Cherry v. Mott* (1835), 1 My. & Cr. 123), the court usually implies a general intention of charity, and has the specific intention of the testator carried out *cy-près*. See *In re Mann, Hardy v. Att.-Gen.*, [1903] 1 Ch. 232. Where the charitable intention relates not to an existing but to a contemplated institution, such as a soup kitchen to be established in a certain parish (*Biscoe v. Jackson* (1887), 35 Ch. D. 460), or a church to be built in a certain district, or to some supposed institution which in fact never existed at all (*In re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876), the court is not inclined to let the difficulty of carrying out, or the improbability that it will ever be possible to carry out, the testator's intention lead to the failure of the gift.

It may be added that once a trust fund has become devoted to charitable purposes, the subsequent failure of such purposes will not put an end to the trust. It will in this case be invariably carried out *cy-près*. See *Smith v. Kerr*, [1902] 1 Ch. 744.

As to what is meant by carrying out a donor's intention *cy-près*, two points may be noted. The first is that the new purpose must be in the nature of the charitable purpose intended by the donor (see *In re Prison Charities* (1873), 16 Eq. 129); the second is that it is permissible to look at the other charitable objects (if any) which the donor intended to benefit by other gifts contained in the same instrument only when it is impossible to carry out any charitable purpose in the nature of that for which the donor made the charitable gift (*Att.-Gen. v. Ironmongers' Co.* (1840), Cr. & Ph. 208; and see *Smith v. Kerr*, *supra*).

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## Art. 9.

ART 9.—*Expressed Intentions assumed to be Actual Intentions.*

When the court has construed the will or deed in accordance with the rules laid down in the preceding articles, and has ascertained thereby the intentions expressed in it, these expressed intentions are assumed to be the actual intentions of the testator or the parties, and no evidence will be admitted to the contrary.

The intention to be sought is the intention which is expressed in the instrument, not the intention which the maker of the instrument may have had in his mind. "It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writing; the expressed meaning being equivalent to the intention. . . . It is not allowable . . . to adduce any evidence, however strong, to prove an unexpressed intention, varying from that which the words used import. This may be open, no doubt, to the remark, that although we profess to be explaining the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that the interpreters have to deal with the written expression of the writer's intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written" (*per* COLERIDGE, J., in *Shore v. Wilson* (1842), 9 Cl. & F. 355, at p. 525).

Extrinsic evidence generally inadmissible

As an example of a case where the court followed the intention as expressed in the instrument, although it was of opinion that that intention was not the real intention of the maker of the instrument, *Smith v. Lucas* (1881),

Expressed intention followed, although court does not believe

**Art. 9.** 18 Ch. D. 531, may be referred to. There JESSEL, M.R. (at p. 542), says : “ The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it ; but, of course, as I very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties.” And see *In re Fish, Ingham v. Rayner*, [1894] 2 Ch. 83.

it to have  
been the  
actual  
intention.

In *Seale v. Rawlins*, [1892] A. C. 342, Lord WATSON, in construing a will, said : “ We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of the will.” And see *Murdoch v. Brass*, [1905] 6 F. 841, *supra*, p. 59.

Illustrations  
of the general  
rule.

In *Teebay v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1883), 24 Ch. D. 572, the defendants, in an agreement to purchase certain lands from the plaintiff, agreed that the plaintiff should have access to some other land belonging to him, over the ground agreed to be purchased. Subsequently, the plaintiff in execution of the agreement conveyed the land to the defendants. The deed of conveyance contained no reservation of rights of access over the land sold, but was absolute in its terms :—*Held*, that in construing the deed of conveyance no reference could be had to the agreement to sell. BACON, V.-C., in delivering judgment (at p. 579), said : “ Reference has been made to several cases, upon the strength of which it is alleged that the terms of the agreement are still in all their force and vitality, and that they are as much binding upon the defendants, the railway company, as if no contract whatever had been made. I do not think that the cases referred to bear out any such proposition. . . . In this case, if there had been a bill alleging that the deed of 1871 had been executed by mistake, or inadvertence, or without properly attending

to the rights of the parties then existing, I might have listened to such a case. . . . But no such case is presented to me. Mr. Teebay, the man who contracted for the sale . . . must be taken to have known what he was doing : and when he and his *cestui que trust* afterwards joined in perfecting the conveyance which had been made, he, in the exercise of his legal right, conveyed all rights, ways, easements, estate and everything else. At law nobody can dispute that this is an absolute extinguishment of any rights which could be asserted under this agreement."

**Art. 9.**  
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An interesting application of the principle stated in the article was made in the case of *In re Huctable, Huctable v. Crawford*, [1902] 2 Ch. 796. There a testatrix bequeathed to A. £4,000 "for the charitable purposes agreed upon between us." These words were held to be sufficient to create a good charitable trust, and extrinsic evidence was admitted to show the particular trusts which the testatrix intended to benefit. This evidence went to show that the agreement between A. and the testatrix was that only the income of the £4,000 during the life of C. was to be devoted to certain charities, the *corpus* remaining C.'s property : *Held*, that as on the face of the will the gift for charitable purposes was of the *corpus* of the £4,000, this evidence was not admissible to contradict such declared intention.

## PART II.

### DESCRIPTION OF DONEES.

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## CHAPTER I.

### INDIVIDUALS.

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#### ART. 10.—*Impersonal description.*

WHERE a gift is made to an individual not by name, but under a description which may at different times apply with equal propriety to different individuals, the only person who will *prima facie* be entitled to take, will be the one to whom it applied at the time the instrument was executed, if there was then any such person in existence.

Illustration:     The most frequent application of this rule is in the case  
Wife.             of gifts to a person's wife.

Thus, in *Re Burrow's Trusts* (1864), 10 L. T. 184, the testator bequeathed, at the death of his wife, the moiety of his property to his brother, William Burrows, should such

brother survive testator's wife, and if he should not, then  
 "to the children of my said brother share and share alike.  
 . . . And I do hereby further order and direct that if  
 the wife of my aforesaid brother should him survive, she  
 shall receive the rents issues and profits arising from that  
 half of my estate hereinbefore directed to be divided among  
 the children of my said brother during her natural life."  
 William Burrows was married at the date of the will.  
 After the testator's death he married a second wife. He  
 died before the testator's widow, whom the second wife  
 survived :—*Held*, that the second wife was not entitled to  
 the income during her life. Art. 10.

In a subsequent case (*In re Lyne's Trust* (1869), 8 Eq.  
 65) a testator left a certain legacy in trust to pay the  
 income to his son for life, and on his death to divide the  
 capital equally between the son's wife and all his children.  
 The son, at the date of the will and at the testator's death,  
 had a wife and one child. Afterwards his wife died, and  
 he remarried but died without leaving any other child :—  
*Held*, by MALINS, V.-C., apparently on the ground that  
 children by the second wife would have been entitled to  
 share, that the second wife was entitled. In the argu-  
 ment the case of *Re Burrow's Trusts*, *supra*, was not  
 cited.

In *In re Coley, Hollinshead v. Coley*, [1903] 2 Ch. 102,  
 the point came before the Court of Appeal. There a  
 testatrix gave her residuary estate to trustees to pay the  
 income to her son for life, and after his decease to "his  
 wife" for her life, and on her death the capital was to be  
 held for "his children." The son had, at the date of the  
 will, a wife living and well known to the testatrix. After  
 the death of the testatrix, she died, and the son remarried.  
 His second wife survived him :—*Held*, following *Re*  
*Burrow's Trusts*, *supra*, and overruling *In re Lyne's*  
*Trust*, *supra*, that the second wife was not entitled to a  
 life interest in the income. ROMER, L.J., said (p. 110) :

**Art. 10.** "It is settled that if in a will you find a gift by the testator to the 'wife' of a person, and that person has at the time a wife living and acknowledged by the testator, the testator *prima facie* intends to refer to the existing wife, and not to any subsequent wife that person may have; unless, indeed, there may be a sufficient context to enable the court to say that the testator is referring also to a subsequent wife, and that the *prima facie* meaning of the gift is displaced. But there must be a sufficient context to show that. Is there such a sufficient context here? . . . I cannot see why a testator should not wish to give a life interest to an existing person merely as the wife of another person, at the same time giving the *corpus* after the death of that wife, to the children of that person by that or any other wife." And see *In re Griffiths' Policy*, [1903] 1 Ch. 739; *In re Browne's Policy*, *Browne v. Browne*, [1903] 1 Ch. 188; and *In re Parker's Policies*, [1906] 1 Ch. 526.

In *Peppin v. Bickford* (1797), 3 Ves. 570, under a bequest not very different from that in *Re Burrow's Trusts*, *supra*, but where the legatee for life was not married at the date of the will, the provision for the legatee's wife was held to apply to any woman he might marry.

In *Marlborough (Lily, Duchess of) v. Marlborough (Duke of)*, [1901] 1 Ch. 165, a peculiar state of facts arose. There a life tenant, under a settlement, had a power to appoint "to any woman whom he may marry" for her life a jointure not exceeding £2,500 per annum. And it was declared that the power might be exercised as often as the life tenant married, but that the jointure charges on the estate should not altogether exceed £4,000 per annum. The life tenant married and jointured his wife with an annuity of £2,500. Subsequently he was divorced. On remarrying after his divorce, he again exercised the power to jointure his second wife with an annuity of £2,500. On his death both the wives were surviving:—

*Held*, that the power was not bad as contrary to public policy, and the second appointment was good, but during the first wife's life the second wife was entitled only to £1,500 a year.

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But the rule is not restricted to gifts to persons' wives, as will be seen from the following cases :

Thus, in *In re Laffan and Downes' Contract*, [1897] <sup>Superioress.</sup> 1 I. R. 469, a testatrix devised lands to A. and B. for life and on the death of the survivor to the superioresses of two convents equally for the benefit of the nuns of such convents. Both at the date of the will and at the death of the testatrix, C. and D. were superioresses of the two convents : but before the death of the survivor of A. and B., C. had died, and E. had been appointed superioress to one of the two convents in her place. Under a contract for the sale of the devised lands, E. was willing to join in the conveyance, but the vendee required that the heir of C. should also join. The MASTER OF THE ROLLS held that inasmuch as a superioress was not a corporation sole, the only persons who could take under the devise were C. and D., who were superioresses at the date of the will, and he allowed the vendee's requisition. In this case the judgment is expressly based on the rule applicable to gifts to a person's wife, and the fact that the devisees took merely for a charitable object was held not to prevent its application. But with great respect, this case appears, to the present writers, to have strained the rule to the utmost extent.

In *In re Whorwood, Ogle v. Lord Sherborne* (1887), <sup>Peer.</sup> 34 Ch. D. 446, a testator bequeathed "to Lord Sherborne and his heirs my Oliver Cromwell cap presented to our common ancestress, for an heirloom." At the date of the will there was a person who bore the title of Lord Sherborne, and who died before the testator. Evidence was given that the testator, when he made the last codicil to his will, was aware that this Lord Sherborne was then dead, and that he nevertheless did not alter in any way

**Art. 10.** the bequest. On the death of the Lord Sherborne in question, the title descended to his son:—*Held*, that the son who was Lord Sherborne at the testator's death, could not take under the bequest. "It is said," COTTON, L.J., observes in delivering judgment, "that the form of the gift 'to Lord Sherborne and his heirs as a heirloom' is sufficient to show that it was the testator's intention that the person who might be Lord Sherborne at the time of the testator's death should take the legacy. I do not think there is any force in the argument. It comes to this, that if properly advised he would have drawn his will differently."

**Eldest son.** Again, "eldest son," where there is nothing in the context or circumstances to rebut the presumption, means the son who at the date of the instrument was "the eldest son" then living. Thus, in *Meredith v. Trefry* (1879), 12 Ch. D. 170, a testator devised his land to A. for life, then to A.'s eldest son for life, and after the eldest son's death to the eldest son's eldest son in fee tail, and if A.'s eldest son died without issue, then A.'s second and other sons successively in tail. A. had at the date of the will an eldest son living, who, however, died before the testator, and without issue. On the testator's death the question arose whether the second son of A.—who was now A.'s eldest surviving son—took a life estate under the will as A.'s eldest son or a fee tail as A.'s second son:—*Held*, that he took a fee tail.

The decision in *Meredith v. Trefry*, *supra*, has, in *Amgot v. Dwarries*, [1904] A. C. 268, been affirmed and followed by the Judicial Committee of the Privy Council, while *Re Harris' Trust* (1854), 2 W. R. 689, which was in conflict with that case, was overruled.

Though, in delivering judgment in *Meredith v. Trefry*, *supra*, HALL, V.-C., laid some weight upon the fact that A. had an eldest son living at the date of the will, it is doubtful whether, if A. had then been childless, the

interpretation of the words "eldest son" would have been different. "Eldest son" differs from such descriptions as "wife" in this point, that strictly speaking, it can, in the nature of things, apply properly only to one person—the first born (*Bathurst v. Errington* (1877), 2 App. Cas. 698). At the same time a small indication of such an intention is sufficient to induce the court to interpret the phrase in the sense of "eldest son for the time being" or "eldest surviving son" (*ibid.*).

Art. 10.  
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The rule that the person answering a general description at the date of the settlement is the only person who can take under a gift to the person answering that description, is easily rebutted by a context suggesting that the person answering it at the death of the testator, or at any other time, was intended. And even where there is no such context the object of the instrument may be sufficient to rebut it.

Rebuttal of  
presumption.

Thus, in *In re Drew, Drew v. Drew*, [1899] 1 Ch. 336, the testator bequeathed the annual income of property to his son B. H. D. for life, and after his decease "unto the wife of my said son for and during her natural life for her separate inalienable use, and from and after her decease, upon trust to pay such interest dividends and income to the lawful child or children of my said son B. H. D. who shall be living at his decease, and who shall live to attain the age of 21 years," and if there were no such children, then over. B. H. D. was married at the date of the will as was known to the testator. Subsequently, however, his wife died, and he married a second wife whom he predeceased. The court held that the words of the bequest were wide enough to cover any wife of B. H. D. who survived him, on the ground that the context showed that all the children of B. H. D., whether by his then or any subsequent wife, who were living at his death, were to be provided for, and it would be extraordinary if the wife then living were not the wife intended to be provided for

Illustrations  
of rebuttals:  
"Wife."

**Art. 10.** too (which, however, is inconsistent with the judgment of ROMER, L.J., in *In re Coley*, p. 67, *supra*) : and on the further ground that the context provided that in case B. H. D. attempted to alienate the income during his life, it was to determine, and the trustees of the settlement were to hold it on a discretionary trust for the benefit of him "and his family" during his life, which would include any wife for the time being. And see *Longworth v. Bellamy* (1871), 40 L. J. Ch. 513).

In *In re Browne's Policy*, *Browne v. Browne*, [1903] 1 Ch. 188, the presumption that by "wife" is meant the actual wife at the date of the execution of the instrument referring to her, was held to be rebutted in the case of an insurance policy taken out under s. 11 of the Married Women's Property Act, 1882, by a husband "for the benefit of his wife and children." This was held to enure for the benefit of a subsequent wife. *See quare* and see *In re Griffith's Policy*, [1903] 1 Ch. 739, where the words were "for the benefit of his wife, or if she be dead between his children in equal proportions."

**Rebuttal of presumption:**  
 "Eldest son." Again, in *Bathurst v. Errington* (1877), 2 App. Cas. 698, a testator limited his lands to the second son of a baronet in tail, and his third and other sons in succession, subject to the condition that on the second or any other son of the baronet "becoming the eldest son" of his father, his interest in the lands devised was to cease, and the interest following to come into possession. Here it was held on the wording of the condition, and on the general object of the testator, which was to exclude the son of the baronet, who, as heir, would be provided for, from enjoyment of the devised lands, that "becoming eldest son" meant becoming the eldest surviving son during his father's lifetime, and as such, entitled to the estates settled to accompany the title.

A similar case is that of *Crofts v. Beamish*, [1905] 2 I. R. 349. There a testator left certain portions of his real estate to each of seven sons with a gift over of each

portion should the son entitled thereto die before attaining the age of thirty years, to "his next eldest brother":—*Held*, that by "next eldest brother" was meant not next elder, but next younger.

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It is to be remembered, however, that the rule applies to ordinary shifting clauses, unless there is something in the context or object of the settlement to show that "eldest son" means heir or heir apparent of his father. See *Meredith v. Trefry*, *supra*, p. 70.

The only cases where, without the assistance of a context suggesting such an interpretation, the court will hold that "eldest child" or "eldest son" means the person who succeeds to the family estate, is where a settlement is made by a parent or a person *in loco parentis* for the purpose of providing portions for the younger children. Here, "eldest son" will mean the person, who, at the period of distribution of the fund providing the portions (see r. 18), is entitled to the family estate, and he will be excluded from the class of younger children, whether, as a matter of fact, he is the eldest child or a younger child who has succeeded to the estate owing to an elder child's death without issue (*Collingwood v. Stanhope* (1869), 4 H. L. 50; *Ellison v. Thomas* (1862), 1 D. J. & S. 25).

Where court will hold that "eldest son" means heir.

#### ART. 11.—Person "born" or "living."

For the purpose of taking under, or fulfilling the condition of a gift, or satisfying the rule as to perpetuities, a child *en ventre sa mère* will come within such words as child or issue "living" or "born" at a certain time.

In *In re Burrows*, *Clapham v. Burrows*, [1895] 2 Ch. 497, the testator devised his residuary realty and personalty to his wife for life, and then to his daughter C. "for her absolute use and benefit in case she has issue living at the

Illustration of this rule.

**Art. 11.** death of my wife," but if she had no issue, then to her for life, and afterwards over to his son. At the death of the testator's wife, C. was *en ciente*, and gave birth to a living child on the following day:—*Held*, that she had "issue living" at the death of the testator's wife. CHITTY, J., in delivering judgment said: "It is said that the word 'issue' imports more than the word 'child,' and that it means that there must be a child born at the period when the mother is to take; but it appears to me that the distinction between the two words is too refined. Then it is said that the rule is that the child *en ventre sa mère* is not deemed to be living, except where there is a benefit passing directly to the child; and as the mother and not the child in this case takes the benefit, the gift overtakes effect. But the question is covered by authority." And his lordship cited the judgments of Lord ELDON and MACDONALD, C.B., in *Thellusson v. Woodford* (1805), 11 Ves. 112, and the remark of EYRE, C.J., in *Doe v. Clarke* (1795), 2 H. Bl. 399, at p. 401, that "The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory and unfit to be the ground of any decision whatever." As to *Blasson v. Blasson* (1864), 2 D. J. & S. 665, his lordship was of opinion that the court there came to the conclusion that the testator intended to draw a distinction between born and unborn children, and that it was on that ground that the court held that "born and living" children (the words used by the testator) did not include a child *en ventre sa mère*.

The matter came once more before the court for consideration, in connection with the rule against perpetuities, in *In re Wilmer's Trusts, Moore v. Wingfield*, [1903] 2 Ch. 411, when it was held that, so far from a child *en ventre sa mère* being regarded as "born" or "living" only when it would, by being so regarded, obtain a benefit, the rule applied even where it resulted in a disadvantage to the child. There a testatrix left realty in trust to pay the income to A. for life, then in trust for her second and every younger son born or to be born successively, with

remainder after the death of each such son upon trust for his first and other sons successively in tail male. On the testatrix's death A. was pregnant with a younger son:—*Held*, that this son must be regarded as a living person and that the limitation over to his eldest son in tail was not bad as within the rule of perpetuities. The younger son, therefore, took merely a life estate and not an estate tail by the *cy près* doctrine.

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In *Villar v. Gilbey*, [1905] 2 Ch. 301, while expressing approval of the rule as laid down in the above article (see p. 304), the court held, that apart from the case of fulfilling the condition of a gift and the rule as to perpetuities, the court should interpret words such as "born in my lifetime" in a strict sense as meaning not *en ventre sa mère*, but actually born. This decision, however, has been reversed by the Court of Appeal ( (1906), 75 L. J. Ch. 308), which held, that for purposes of devolution of property under wills or intestacies *primâ facie*, "children born" include children *en ventre sa mère*.

As to land, the old common law rule (which, however, was a rule of law and not of construction) seems to have been that a child *en ventre sa mère* was to be regarded as living for the purpose of taking by descent, but not by purchase (*Reece v. Long* (1694), 1 Salk. 227; and see Butler's note Co. Litt. 298 a). Accordingly, a limitation, at any rate by deed, directly to a child *en ventre sa mère* was bad, and if it was by way of remainder it failed if the child was not born until after the particular estate determined. The law, however, as to this, was altered by 10 & 11 Will. 3, c. 16, and a child *en ventre sa mère* can take by purchase as well as by inheritance. The common law rule never applied to limitations by way of use or executory devise (*Long v. Bluefall* (1797), 7 T. R. 100).

As to the meaning of "without being married," "without leaving children," etc., see *infra*, Glossary.

## CHAPTER II.

## RELATIONSHIP.

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ART. 12.—*Relationship means primarily blood  
relationship.*

Where persons are described by terms expressive of their relationship to some other person the description will be held to include only those related to such by the whole or half blood; and where the degree of relationship is stated only those so related in that degree. But the term may be extended by necessary implication from the condition of things in reference to which the instrument was made or by the context to include also persons related only by affinity or related in a different degree.

Authority. "There is not any hard and fast rule that a gift to nieces does not include a great-niece, where in another part of the same will a great-niece is described as a niece; nor, on the other hand, is there any hard and fast rule that, whenever a great-niece has once been referred to in a will as a niece, the expression "niece" must in all other parts of the will be taken to include great-nieces. The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible,

the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred " (*per* SWINFEN-EADY, J., in *In re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138, at p. 143).

Art. 12.

As will be seen, this rule is merely a particular and very common application of the general rule in Art. 2, para. 2, *supra*, p. 31. A very short illustration of it will therefore be sufficient.

In the first place, then, where the gift is simply to a person's "relations" *prima facie*, the husband or wife of the prepositus is not included (*Green v. Howard* (1779), 1 Bro. C. C. 31). To prevent such a gift failing for uncertainty, it has been construed, in wills, at any rate, as equivalent to next-of-kin according to the Statutes of Distributions, even when the gift is a devise (*Doe d. Thwaites v. Over* (1808), 1 Taunt. 263).

In the next place, "relations" simply, or relations of a certain degree, such as brothers, etc., includes equally persons related by the whole and persons related by the half blood (*Grieces v. Rawley* (1852), 10 Hare, 63; *In re Reed* (1888), 36 W. R. 682).

In the third place, when the term used is descriptive of a certain degree of relationship to the prepositus, *prima facie* only those persons actually of that degree are included under it. And before this meaning is departed from, the court, in the words of JAMES, L.J., in *In re Blower's Trusts* (1871), 6 Ch. 351, at p. 353, "must be reasonably sure," it is following the intention of the testator.

Thus, in *In re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138, a testatrix first gave certain property to be divided among certain persons named, nephews and nieces of her late husband, and "my nieces Emma Moore and Sarah Metcalf." Emma Moore was in fact the daughter of William Moore, a nephew of the testatrix, and Sarah Metcalf was the illegitimate son of a sister of testatrix.

**Art. 12.** Next the testatrix gave a legacy to William Moore and legacies to each of his children except Emma, whom she rightly described as daughter of her nephew. Then she left a hotel to trustees upon trust (*inter alia*) to pay an annuity “to my nephew, Alexander Duncan.” Alexander Duncan was in fact the nephew of the testatrix’s late husband. Then she left one moiety of the proceeds of her residuary estate in trust for Alexander Duncan for life, then for his wife for life, and on the death of the survivor upon trust “to pay and divide the said moiety unto and among all my own nephews and nieces with the exception of Mary Ann, the sister of William Moore, share and share alike”:—*Held*, that the expression “my own nephews and nieces” restricted the class to persons who were the lawful nephews or nieces of the testatrix, of the whole or half blood, to the exclusion of great-nephews or great-nieces of the testatrix, nephews or nieces of her husband, a daughter of an illegitimate son of a sister of testatrix, and all other persons, though some of them might have been inaccurately referred to in some other part of the will as “my nephew” or “my niece.”

As examples of cases where the primary meaning has been rebutted, see *Scale-Hayne v. Jodrell*, [1891] A. C. 304; *In re Gue*, [1892] W. N. 132, and the next article.

**ART. 13.—*Relationship means primarily Legitimate Blood Relationship.***

(1) Where persons are described by terms expressive of their relationship to some other person, the description will be held to include those only who are so related in legitimate kinship, and not those reputed to be so related in natural kinship, unless it is necessarily implied from the condition of things with

reference to which the instrument was made, or it appears from the words of the instrument itself, that persons reputed to be so related in natural kinship were intended to be included.

**Art. 13.**

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(2) The condition of things with reference to which the instrument was made is never where the relationship is through the father, though it may be where the relationship is through the mother, sufficient in itself to raise a necessary implication that natural relations born after the execution of the instrument were intended to be included under terms expressive of their relationship.

#### PARAGRAPH (1).

"It is, of course, not open to dispute that the word Authorities, 'relatives,' according to its natural interpretation if there were nothing to show that another meaning was to be attributed to it, would not include those who were what may be termed natural blood relations, but whose parents or grandparents were not born in wedlock, and who, therefore, were not in the eye of the law related to the testator. But it is not disputed that if the testator has in the provisions of his will indicated whom he considers to be 'relatives' in the sense in which he is speaking of relatives, or members of his family, you are entitled to look at those other provisions in order to interpret the word 'relatives' as used in this part of his will?" (*per* Lord HERSCHELL, in *Scale-Hague v. Jedrell*, [1891] A. C. 304, at p. 305).

"The rules of law and of construction applicable to this case are—first, that a gift to children means a gift to the lawful children of a lawful marriage, unless (which is the second rule) there be something which, in express

**Art. 13.** terms or by what has been called ‘necessary implication’ shows that the gift is to illegitimate children exclusively, or to illegitimate children to be included in a class with, or to a class of illegitimate children who are to take conjointly with, another class of legitimate children. It is agreeable to us to find so clear a rule laid down as to what is meant by ‘necessary implication’ as that which we find in Lord ELDON’S judgment in the case of *Wilkinson v. Adam* (1813), 1 V. & B. 422 : that is, that necessary implication means, not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed” ( *per* JAMES, L.J., in *Crook v. Hill* (1871), L. R. 6 Ch. 311, at p. 315).

“What appears to be the principle which may fairly be extracted from the cases upon this subject is this—the term ‘children’ in a will *prima facie* means legitimate children, and if there is nothing more in the will the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible, from the circumstances of the parties, that any legitimate children could take under the bequest. . . . The other class of cases is of this kind. Where there is, upon the face of the will itself and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term ‘children’ not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children” ( *per* Lord CAIRNS, in *Hill v. Crook* (1873), L. R. 6 H. L. 265, at p. 283).

Meaning of  
legitimate  
relationship.

By legitimate relationship is meant, not merely relationship which is legitimate by the common law of England, but also relationship which would not be legitimate by the

## Art. 13.

common law but is legitimate by the law of the domicile of the persons so related. In the words of KAY, J., "The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile. Thus, *ante nati*, whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of Guernsey, are recognised as legitimate by the law of this country, and can take under such a gift" (*In re Andros*, *Andros v. Andros* (1883), 24 Ch. D. 637, at p. 639). And this rule applies to gifts of realty as well as to gifts of personalty (*In re Grey's Trusts*, *Grey v. Stamford*, [1892] 3 Ch. 88), the rule of *Doe v. Vardill* (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895, that the son of a deceased person to be *heir at law* must be legitimate according to the common law, being confined strictly to *inheritance* of realty (*In re Goodman's Trusts* (1881), 17 Ch. D. 266).

Where the domicile is in a country where there is no *lex loci* as to legitimacy, but merely a personal law dependent on the religion of the parties, the court, in the absence of evidence of religion, will not follow the technical rules of English law, but adopt a very liberal construction in deciding who are to be included under terms expressive of relationship (*Barlow v. Orde* (1870), L. R. 3 P. C. 164).

The rule that in construing wills and deeds relationship always is to be read legitimate relationship is not now so strictly observed as it once was. Many of the older decisions have been expressly overruled or dissented from. Thus, in *In re Waller*, *Waller v. Ladgens*, [1897] 2 Ch. 238, ROMER, J., declares that *Bagley v. Mollard* (1830), 1 Russ. & My. 581, which lays down that "whenever the

Rule as to  
legitimacy  
now relaxed.

**Art. 13.** general description of children will include legitimate children it cannot also be extended to illegitimate children " is no longer good law. And in *In re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565, STIRLING, J., declined to follow *In re Standley's Estate* (1868), 5 Eq. 303, which held that a gift to an illegitimate person for life and on her death without children to her next of kin, did not pass to the persons who would have been her next of kin had she been legitimate, and which has since been overruled in *In re Wood, Wood v. Wood*, [1902] 2 Ch. 542. And, independently of decisions expressly overruled, the strong tendency of recent decisions has been, in the words of KEKEWICH, J., in *In re Parker, Parker v. Osborne*, [1897] 2 Ch. 208, at p. 211, " more and more to open the door for the admission of those born out of wedlock, and in particular to sanction a construction in their favour, if it can fairly be extracted from the language of the will," or it may be added if it is fairly suggested by the surrounding circumstances.

Rule applies, save where rebutted by surrounding circumstances or context.

At the same time, the rule that terms of relationship mean *prima facie* legitimate relationship, still remains, and is to be applied to the construction of all written instruments where there is nothing to prevent its application. And nothing will prevent its application except proof, either arising out of the condition of things with reference to which the instrument was made, or arising out of the instrument itself that illegitimate relationship was intended.

Examples of rebuttal by surrounding circumstances.

A good example of the condition of things which proves that the instrument was meant to apply to illegitimate relationship is given by Lord CAIRNS in *Hill v. Crook* (1873), L. R. 6 H. L. 265, at p. 283: " Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have intended to benefit some children of

his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether, the courts will hold that those illegitimate children are intended, and they will take under the term ‘children.’”

Art. 13  
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Another recent example of a condition of things which proves the instrument was intended to apply to illegitimate relations is the case of *In re Deakin, Starkey v. Egres*, [1894] 3 Ch. 565. There a testator left the income of his estate to his widow during her life, and gave her power on her death to appoint a moiety of the *corpus* among “her relations.” The widow, as the testator knew, was illegitimate, and therefore could have no legitimate relations except her own issue, and she had at the date of the will been married many years, was forty-seven years of age and still childless. On the other hand, her father and mother had subsequently to her birth married and had a family, with whom she had been brought up, and by whom she was treated and regarded as a sister. On her death, she, being still childless, appointed by her will a moiety of her husband’s estate to her brothers and sisters and their children—among the latter being one who was the natural child of a deceased sister:—*Held*, that by necessary implication, as defined by ELDON, C., in *Wilkinson v. Adam*, *supra*, “wife’s relations” here must have been meant to include the natural relations who would have been her legitimate relations had she been legitimate, and that therefore the appointment was good as to these. But *held*, further, that the appointment to the natural child of the deceased sister was bad, since there was nothing in the surrounding circumstances, or on the face of the will, to show that it was intended by the testator to include the natural children of the wife’s relations among the wife’s relations.

It is impossible to lay down any rule as to what the court will think a sufficient indication in the will itself Examples of  
indicated by  
context.

**Art. 13.** that the testator intended to include illegitimate as well as legitimate relations under a term of relationship. A few examples of what has been so held may, however, be given. The modern law on the subject may be said to date from *Hill v. Crook* (1873), L. R. 6 H. L. 265. There, one J. C. was the widower of a deceased daughter of the testator. With the testator's consent, he went through the ceremony of marriage with Mary, another daughter of the testator, and at the date of the will Mary was living with him as his wife. The testator in his will, after describing J. C. as his son-in-law, bequeathed his leaseholds in trust for "Mary the wife of J. C.," for life, for her sole and separate use, independent of the debts or control of "her present or any after taken husband," and subject to certain other trusts, on the death of Mary, "to the child if only one or all the children if more than one of my said daughter Mary C. . . . But if there shall not be any child of my daughter M. C." then over. Mary C. had several children by J. C. during the testator's life, as was known to the testator, who treated them as his grandchildren:—*Held*, that these children, though illegitimate, were entitled to take under the gift on their mother's death. Lord CAIRNS, in his judgment, at p. 286, says: "It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother,' and 'children,' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person, when he speaks of the 'children' of his daughter, this meaning, that, as he termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children, according to that nomenclature. That is all that your lordships have to find. If you find that that is the nomenclature used by the testator, taking

his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires."

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—

In *Seale-Hayne v. Jodrell*, [1891] A. C. 304, the will described various persons not legitimately related to the testator as "his cousins," and subsequently there was a residuary gift over to "my relatives hereinbefore named":—*Held*, that "hereinbefore named" meant not hereinbefore mentioned by name but hereinbefore specified, and that the illegitimate persons previously described in the will as the testator's cousins were included among the "relatives hereinbefore named."

In *In re Parker, Parker v. Osborne*, [1897] 2 Ch. 208, the testator, after giving a legacy to an illegitimate nephew of his wife, under the description of "my wife's nephew R.," left a residuary gift to his wife's "nephews and nieces" equally:—*Held*, that R. was included in the residuary gift.

In *In re Walker, Walker v. Lutjens*, [1897] 2 Ch. 238, the testatrix described G. S. A., the illegitimate daughter of the testatrix's niece M. A., as "M. A.'s daughter G. S. A.," and also as the testatrix's "grandniece." By the terms of the will, on the death of a niece leaving issue, the income given by the will to the niece during a certain period was to go over to such niece's issue. M. A. died during this period:—*Held*, that G. S. A. was entitled to the income during the remainder of it. And see *In re Smiller, Bedford v. Hughes*, [1903] 1 Ch. 198, and *In re Kiddle, Gent v. Kiddle*, [1905] W. N. 81.

#### PARAGRAPH (2).

Independently of questions of construction, and on the ground that it is contrary to the policy of the law to permit such gifts, gifts made expressly or by necessary implication to illegitimate persons not begotten at the

What illegitimate children can take.

**Art. 13**

time the will or deed comes into operation—that is, at the date of execution in the case of a deed, or the death of the testator in the case of a will—are void (*Crook v. Hill* (1876), 3 Ch. D. 773). This is important when the gift is made to the illegitimate persons as a class—as “to C. D.’s children begotten or to be begotten on the body of A. B.” As will be seen in the case of a gift such as this, if C. D. were married to A. B., and the enjoyment of the gift were postponed, all the children born before the gift took effect in enjoyment might participate in it. See p. 105, *infra*. But if C. D. were not married to A. B., only the illegitimate children born and (subject to what follows) those *en ventre sa mère* when the will or deed came into operation could take, whether the gift was immediate or postponed.

Example of  
after-born  
illegitimate  
children  
being  
excluded.

A recent example of the exclusion of after-born illegitimate children where after-born legitimate children would take is *In re Harrison, Harrison v. Higson*, [1894] 1 Ch. 561. There the testator left the income of part of his estate to his daughter A. J. H. for life. He described A. J. H. as the wife of J. H., although to his knowledge she was not legally J. H.’s wife, J. H. having previously been married to a sister of hers, then deceased. Upon the death of A. J. H., the *corpus* of the gift was directed to be divided among her children. At the date of the will, A. J. H. had one child by J. H. After the testator’s death she had two more children by J. H. :—*Held*, that though it was clear from the terms of the will and the condition of things with reference to which the will was made, that the testator intended all A. J. H.’s children by J. H. to take, and though under the gift if A. J. H. had contracted a valid marriage and had legitimate children after the testator’s death, they would take, yet the illegitimate children born after the testator’s death were excluded.

Paragraph 2, however, deals with a different point, and one which can only arise in the case of gifts made by will.

That point is, whether illegitimate children begotten after the will was made, but before it came into operation, can take under a gift to children as a class? It seems to be clearly settled that where the gift is expressly to reputed children by a particular person after-born children so reputed will take, whether they are described by their relationship to the natural father or mother, provided, in case of the father, he has before the will came into operation acknowledged them as his children.

Thus, in *Occleston v. Fullalove* (1874), 9 Ch. 147, a testator made a bequest to his reputed children C. and E. and all other children whom he might have, or be reputed to have, by M. L. (his deceased wife's sister), then born or thereafter to be born. A third child, of whom M. L. was *enccinte* when the will was made, was born during the testator's lifetime, but after the date of the will:—*Held*, that the third child was entitled to share in the bequest. In *In re Goodwin's Trust* (1874), 17 Eq. 345, JESSEL, M.R., interpreted this decision as meaning that "a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such a child as described in the will before the death of the testator or testatrix."

As pointed out, however, by COTTON, L.J., in *In re Bolton, Brown v. Bolton* (1886), 31 Ch. D. 542, at p. 552, *Occleston v. Fullalove, supra*, "leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity." The gift there was not to a child but to a reputed child of the testator, and all the court decided was that a child who was begotten at the date of the will and was before the testator's death his acknowledged child, was his reputed child within the meaning of the will. Where, however, the gift is to the "child" of a man the court will never hold that surrounding circumstances are sufficiently strong

**Art. 13.** to enable the court to decide that by necessary implication future illegitimate children were intended to be included in the gift.

Thus, in *In re Bolton, Brown v. Bolton* (1886), 31 Ch. D. 542, the facts were as follows: The testator had gone through the ceremony of marriage with J. C., who had previously been married to G. B. The testator knew that there were doubts as to whether G. B. was dead, and as a matter of fact G. B. was found to be living after the testator's death. Consequently the testator's children by J. C. were illegitimate. The testator, in his will, described J. C. as "his dear wife." He left her a life interest in his estate, and subject thereto the estate was to be divided equally between "all and every my child or children." In the gift to the children, it will be noted, there was no reference to their being his children by J. C. At the date of the will, the testator had no children by J. C., but before his death she became *enceinte* of a child who was born after the testator's death. The court held that this child could not take under the gift to all and every the testator's child or children.

This decision was followed in *In re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573, and in *In re du Bochet, Mansell v. Allen*, [1901] 2 Ch. 441. The latter was a very strong case. A testatrix bequeathed her residuary estate in trust (among others) for the children of her nephew, being daughters who attained the age of twenty-one years. At the date of the will the nephew was living with a woman who was his reputed wife and whom the testatrix believed to be his wife, but in fact he was not married to her. The nephew had two daughters by his reputed wife at the date of the will, and subsequently had a third daughter by her, who was born before the death of the testatrix: *Held*, that the third daughter was not entitled to share in the gift.

There are two grounds given for these decisions. The first is that an illegitimate child cannot take under a gift

to children unless, in the words of JAMES, L.J., in *Crook v. Hill* (1871), L. R. 6 Ch. 311, at p. 315, "there is so strong a probability of intention to include, or not to exclude, the children in question as that a contrary intention cannot be supposed." Another ground is that stated by COTTON, L.J., in *In re Bolton, Brown v. Bolton* (1886), 31 Ch. D. 542, at p. 552, "to ascertain whether a child is the testator's child we should have to inquire into circumstances which the law does not permit to be inquired into"—that is, the actual paternity of the child. It is difficult for an ordinary mind to see how either of these grounds applies more strongly to after-born children who are acknowledged by their father than to previously born children not identified by name. However, the second ground does not apply in the case of relationship described by maternity, and accordingly the after-born illegitimate children so described are admitted to claim under a gift to her children more freely than those described by reference to their paternity. See *In re Hastie's Trusts* (1887), 35 Ch. D. 728.

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Thus, *In the Estate of Sarah Frogley*, [1905] P. 137, an unmarried woman by her will made in 1876 left her property in trust for all the children who might "belong to" her at the date of her death. In 1878 she gave birth to an illegitimate child who survived her:—*Held*, that the child was entitled. And see *In re Loveland, Loveland v. Loveland*, [1906] 1 Ch. 542.

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ART. 14.—Where "Issue" is to be read "Children."

*Primâ facie* the term "issue" of a certain person includes all such person's lineal descendants. But the term may be restricted by the context of the instrument so as to include only the children of such person; and will be so restricted where in the case of an original gift the person whose "issue" is spoken of, or, in the case of a substitutional gift, the first

**Art. 14.** taker, is described as the “parent,” “father,” or “mother” of the “issue.”

**Authorities.** “Although it is true that among lawyers ‘issue’ is generally taken to mean descendants, we must not allow ourselves to be misled by that. We must not start with any predisposition to read the word in that way, but we must look at the will and try and see whether the testator has shown what he meant when he used the word. The word ‘issue’ is said to have a flexible meaning—it may mean ‘children’ or it may mean descendants of any degree. There is no hard and fast rule” (*per* LANDLEY, L.J., in *In re Birks, Kenyon v. Birks*, [1900] 1 Ch. 417, at p. 418).

“Of course, if the word ‘issue’ is used in a general sense, it must have the larger meaning of ‘descendants’ given to it; but it may be gathered from a will in a particular case that the testator meant the word to have a more restricted meaning, or that in one place he intended it to have a restricted meaning and in other places the wider” (*per* ROMER, L.J., *ibid.*, at p. 420).

The rule of interpretation by which “issue” is to be read as “children,” where the person whose “issue” are in question is described as the “issues” parent, is usually called the rule in *Sibley v. Perry* (1802), 7 Ves. 522, though, as JAMES, L.J., points out in *Ralph v. Carrick* (1879), 11 Ch. D. 873, at p. 882, it is rather *Pruett v. Osborne* (1840), 11 Sim. 132, which decided it; but it is only one of many circumstances which may be sufficient to restrict the meaning of “issue” to children.

Thus, in *In re Birks, supra*, there were twelve distinct legacies containing gifts over to the “issue” of legatees dying in the testator’s lifetime. Except in the case of the eleventh legacy, the gift over in each contained words clearly restricting “issue” to “children.” In the eleventh case the gift over to “issue” contained no words of

restriction whatever:—*Held*, reversing the decision of KEKEWICH, J., that in the eleventh legacy “issue” must also be read “children.” *Cf. In re Waugh, Waugh v. Cripps*, [1903] 1 Ch. 744, where the word was not “issue” but “heirs.” Art. 14.

But the rule will not be applied where the gift is substitutionary and the person described as parent is not the original legatee. Thus, in *Ralph v. Carrick, supra*, a share of a testatrix's estate was given “to the children of my late aunt Mrs. Wingate equally among them, the descendants (if any) of those who may have died being entitled to the benefit which their deceased parent would have received had he or she been then alive”:—*Held*, that “descendants” is not as flexible a word as “issue,” but that even if Mrs. Wingate's children's “issue” had been referred to, the substitutionary gift would not have been restricted to their children. And see *Berry v. Fisher*, [1903] 1 I. R. 484.

## CHAPTER III.

## CLASSES.

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ART. 15.—*Description of a Class.*

A GIFT is made to a class when (whether the donees are individually named or not) it appears from the instrument of gift :

- (1) That they are to take as persons coming within a general description (*i.e.*, as a true class) ; or
- (2) That although one general description will not cover the donees, yet that the donor intended them to take not as individuals, but as members of a body of persons.

In *Kingsbury v. Walter*, [1901] A. C. 187, Lord DAVEY, in discussing what is meant by a class, says (at p. 192) : “ *Prima facie* a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator . . . . But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made to ‘ all my nephews and nieces including A.’ or if a gift is made ‘ to C. and all other my nephews

and nieces, each of those would be a class gift. *Stanhope's Case* (1859), 27 Beav. 201, is an example. . . . There may also be a composite class, such as, for instance, children of A. and children of B.: that would be a good class. On the other hand, a gift to A. and all the children of B. is, in my opinion, not a class gift. . . . But it is perfectly plain that a gift in this form may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift.”

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In *Re Chaplin's Trusts* (1863), 12 W. R. 147, Sir W. P. Wood, V.-C., says that a gift to a class is “a gift to one set of persons all filling one common character or holding some definite position, and a gift to a number of residuary legatees does not thereby constitute them a class.” The first part of this definition is hardly accurate. The principle laid down by Sir J. ROMILLY, in *Re Stanhope's Trusts* (1859), 27 Beav. 201, and approved by CHITTY, J., in *Re Jackson, Shiers v. Ashworth* (1883), 25 Ch. D. 162, is more in accordance with the decisions, namely, that a testator could make a gift in effect to a class if from the form of the gift it appears that the legatees are to take as a class. In other words the question always is, how did the donor intend the donees to take, as disclosed by the instrument itself? If he intended them to take as individuals, even though they all come within one general description—as “my sons John George and Thomas” then they take as individuals (*Orford v. Orford*, [1903] 1 L. R. 121). If on the other hand he intended them to take as a class, even though they do not all come within one general description—as “the children of A. and B. respectively”—they will take as a class (*Fletcher v. Fletcher* (1882), 9 L. R. Ir. 301); and see *Lady Lincoln v. Pelham* (1804), 10 Ves. 166). See *Kingsbury v. Walter*, *supra*, and *cf. In re Venn, Lindon v. Ingram*, [1904] 2 Ch. 52, and *Capes v. Dalton* (1902), 86 L. T. 129.

Meaning of  
“taking as a  
class.”

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Exclusion or inclusion of person, nomination does not prevent donees taking as a class.

Thus, the mere exclusion by name of a person or persons who would otherwise belong to the class, will not prevent the gift being construed as a gift to a class. In *Dimond v. Bostock* (1875), 10 Ch. D. 358, the gift was to the testatrix's husband's nephew's and nieces "who were living at the time of his decease, except A. and B." :—*Held*, that this was a gift to a class. And see *In re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138. Again, the inclusion by name of one who would be included if he were not named, does not make a gift to him and the others of the class, not a gift to a class (*Re Allen, Wilson v. Atter* (1881), 44 L. T. 240). The reason given by JESSEL, M.R., why the inclusion *nominatim* should not make the gift a gift to an individual—that the inclusion in such cases is probably due to some doubt in the testator's mind as to the legitimacy of the person included (*ibid.*, p. 241)—would go to show that the inclusion *nominatim* of a person not a member of this class would not make a gift to him and the class a gift to individuals, since, if the person included was illegitimate in fact he would not be a member of the class (*supra*, p. 76). And that has been decided in *Porter v. Fox* (1834), 6 Sim. 485, where, however, the construction was helped by the context. As a rule, however, under a gift to "A. and the children of B." (or in like words) A. and the children of B. will not take as a class (*In re Featherstone's Trusts* (1882), 22 Ch. D. 111; *In re Venn, Lindon v. Ingram*, *supra*, and *cf.* *Kekewich v. Barker* (1903), 88 L. T. 130).

Naming persons who constituted class at date of instrument.

The naming of the persons, who, at the time the instrument was made, constituted the class, will not prevent such persons taking as a class, provided it is clear that the donor intended that they should. Thus, in *In re Jackson, Shiers v. Ashworth* (1883), 25 Ch. D. 162, the testator left the residue of his property in trust for "my son G., my daughters L. M., A. and F., and such of my child or children if any hereafter to be born as shall attain the age of twenty-one years or marry in equal shares as tenants in common but subject as to any share of any daughter to be born to the trusts

following," the share of such daughter being settled. At the date of the will, the testator had one other daughter living besides those mentioned in the will, but no other children were afterwards born to him:—*Held*, that the five named children took as a class. See *Re Stanhope's Trusts* (1859), 27 Beav. 201, and *cf.* *In re Stansfield, Stansfield v. Stansfield* (1880), 15 Ch. D. 84, and *In re Smith's Trusts* (1878), 9 Ch. D. 117).

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ART. 16.—*Gift subject to a Power of Selection.*

1. Where under a gift or trust a power is given to select the members of the class who shall take, then if there is a clear intention to benefit the class in any event, the gift or trust will be held, in so far as the donee of the power fails to exercise it, to be a gift or trust in favour equally of all members of the class who were in existence at the time the power should have been exercised.

2. A specific gift over on default of selection is sufficient to show that there was no intention to benefit the class even when such gift over is void.

"It is perfectly clear that where there is a mere power of disposing, and that power is not executed, the court cannot execute it. It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust. One question therefore is, whether [the donee of the power] had a trust to execute or a mere power" (*per* Lord Eldon, C., in *Brown v. Higgs* (1803), 8 Ves. 561, at p. 570). Authorities.

"You must find in the will an indication that the testatrix did intend the class or some of the class to take

**Art. 16.** — intended, in fact, that the power should be regarded as in the nature of a trust—only a power of selection being given as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint” (*per* ROMER, J., in *In re Weekes' Settlement*, [1897] 1 Ch. 289, at p. 292).

A gift over  
on default of  
appointment  
not necessary.

This rule is often stated in such a way as to suggest that the mere grant of a power to appoint a fund among a class amounts to an implied gift of the fund to the class in default of appointment, unless there is an express gift over on that event. This is not so. To make the grant of a power imply a gift to the class, there must be a clear intention to benefit the class, and the power must amount to a mere power to select the members of the class who are to benefit. In other words, the intention of the donor, as it appears from the instrument, must be to create a trust in favour of the class generally, giving the donee of the power a discretion as to which members of the class shall take. Then, if the discretion is not exercised, the trust in favour of the class takes effect, and all members take equally.

The only importance of a gift over in default of appointment, is that the existence of such a gift over rebuts any inference the court might be inclined to draw from the words of the instrument as to an intention to benefit the class generally (*Goldring v. Inwood* (1861), 3 Giff. 139). In this connection it may be noted that a residuary gift is not a gift over in default of appointment for this purpose (*In re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36). And that if there be a gift over, the inference of an intention to benefit the class is rebutted, even though the gift over is void (*Re Sprague, Miley v. Cape* (1880), 43 L. T. 236).

Examples of  
cases where  
the rule was  
held to apply.

In the following cases, the court held that a general intention to benefit the class, was sufficiently indicated: In *Brown v. Higgs* (1799), 4 Ves. 708; (1803), 8 Ves. 561, where the limitation was “to such children of A. as B. shall

think most deserving or to the children of C." In *Burrough v. Philcox* (1840), 5 My. & Cr. 73, where the limitation was to the two children of the testator for life, and if they both died without lawful issue, then the survivor was to have power to dispose by his will of the property "amongst my nephews and nieces or their children either all to one of them or to as many of them" as the surviving child should think proper. In *Re Susan* (1877), 47 L. J. Ch. 65, the limitation was to A. and B. for life, and for such descendants of C. as B. should by will appoint. In *Longmore v. Brown* (1802), 7 Ves. 124, where the limitation was to the testator's brothers and sisters or their children, in such shares and proportions, and at such times as the donees of the power should think fit. In all these cases in default of appointment, the fund was held to go to the class intended to be benefited, in equal shares *per capita*, and the class was held to consist of all the objects mentioned, whether these objects were joined by a conjunctive or disjunctive conjunction. Thus, in *Longmore v. Brown, supra*, the class was composed of all the testator's brothers and sisters, or their children.

In the following cases the court held that a general intention to benefit the class was not sufficiently indicated. In *Healy v. Donnelly* (1853), 3 Ir. C. L. R. 213, the limitation was to the testator's daughter for life, with power by deed or will to dispose of the freehold to and among her children with no gift over in default of appointment. In *In re Weeks' Settlement, supra*, the limitation was to the husband of the testatrix for life, "and I give to him power to dispose of all such property by will amongst our children." There was no gift over. In *Carberry v. McCarthy* (1881), 7 L. R. Ir. 328, any inference which might have been drawn from the words used in limiting the gift and power, was held to be rebutted by a recital in the will to the effect that the testator had already sufficiently provided for the class generally.

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Examples of cases where rule was held to be excluded.

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Where rule  
applies, class  
takes equally  
*per capita*.

Where the class takes in default of appointment, all the members of it take in equal shares *per capita*, and apparently as tenants in common (*Wilson v. Daquid* (1883), 24 Ch. D. 244; *Re White's Trusts* (1860), Johns. 656). And they will all take the residue in equal shares where the power to appoint has been exercised partially in favour of certain members (*Fordyce v. Bridges* (1848), 2 Phill. 497). Where there are two or more distinct classes of objects such as the relatives of the settlor on the one hand, and certain charitable objects on the other, the rule seems to be that in default of appointment the fund is to be divided equally between the two or more classes (*Salisbury v. Denton* (1857), 3 K. & J. 529; *Loughmore v. Broom* (1802), 7 Ves. 124). And where there are directions that one of the persons among whom the fund may be appointed, is to take his share on different terms or in a different mode from the others, this constitutes him a separate object from the class which the rest make up, and, accordingly, on failure of appointment he will take a share equal to the whole of the class which is the other object intended to be benefited. Thus, in *Little v. Neil* (1862), 10 W. R. 592, a fund was vested in trustees to apply the income to such one or more of the wife and children of A. as they should think fit, but any provision for the wife was to be by way of annuity for her separate use, determinable on the death of her husband:—*Held*, in default of appointment the wife took half the fund.

Who constitute the class taking in default of appointment.

The objects who form the class or classes that will take in default of appointment, depend, it is submitted, upon the ordinary rules regulating classes (see *infra*). If the gift be immediate—*e.g.*, “to such children of A. as B. shall appoint”—only such children as were living when the instrument came into operation, would take in default of appointment. If, on the other hand, the gift was postponed—which is the usual case in gifts of this description—then those who would take would be those forming the

class at the time the power could be exercised. Thus, if the gift was to "A. for life and subject thereto to such of A.'s children as A. might by deed or will appoint," then in default of appointment, all the children of A. living not merely at the time when the instrument came into operation, but all those born during the life of A. (or if dead, their representatives), would be entitled in default of appointment. If, on the other hand, A. could only appoint by will, only those children who were living at A.'s death would, in default of appointment, be entitled (*Freeland v. Pearson* (1867), L. R. 3 Eq. 658; *Sinnott v. Walsh* (1880), 5 L. R. Ir. 27; *Re Susanni* (1877), 47 L. J. Ch. 65).

**Art. 16.****ART. 17.—*Gift to wrongly enumerated Class.***

Where a gift is made in terms which would make it a gift to a class simply but for the fact that the number of persons constituting the class is stated and is different from the real number, then the court in the absence of anything to shew that particular members of the class were intended, will reject the enumeration as a mistake and construe the gift as a gift to the class simply.

"Authorities establish, as is contended, this proposition: Authorities, that wherever there is an enumeration of persons to be benefited, and that enumeration is erroneous and does not tally with the facts, the court may reject the enumeration. I think that is stating the proposition much too widely. I think the proposition must be limited to this — that where the court, as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons

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composing that class, the court will reject the enumeration. I think the principle of the cases goes no further than that " ( *per* Lord RUSSELL OF KILLOWEN, L.C.J., in *In re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, at p. 81).

Application  
of the rule.

This rule applies equally whether the real number of the class is greater (*Garvey v. Hibbert* (1812), 19 Ves. 124), or smaller (*In re Dutton W. N.* (1893), 65) than the number in the instrument of gift, or whether the gift is a gift to the class generally (*In re Groom, Booty v. Groom*, [1897] 2 Ch. 407), or to each member of the class individually (*Daniell v. Daniell* (1849), 3 De G. & Sm. 337). Sometimes it has been carried very far indeed.

Illustrations.

Thus, in the last-mentioned case the testatrix made a will leaving £500 each " to the three children of A." A., at the date of the will, had to the testatrix's knowledge three children and no more. Subsequently six more were born and the testatrix was duly informed of the fact. Nevertheless, in three later wills the testatrix continued merely the gift to the three children of A.:—*Held*, that all the nine children of A. took legacies of £500 each. And see *Yeats v. Yeats* (1852), 16 Beav. 170.

In *In re Emery's Estate, Jones v. Emery* (1876), 3 Ch. D. 300, the facts were almost identical with those in *Daniell v. Daniell*, *supra*, save that both the will and codicil were made before the actual birth of the fourth child, though it was then *en ventre sa mère*. The court, however, held that there was no ambiguity or mistake, and that the three children living when the will and codicil were made alone took under the gift.

There must  
be intention  
to benefit the  
class.

It is to be noted that the rule applies only where the court finds an intention to benefit the class generally, which, however, will be assumed to be the case until it is shown that the intention was to benefit only some members of the class. When that is clear, then, if there is evidence enough in the words of the will or in the surrounding

circumstances to enable the court to identify the members to be benefited, these alone take, and if there is not evidence enough the gift fails for uncertainty.

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In *Newman v. Piercey* (1876), 4 Ch. D. 41, the testatrix, by a will made in 1873, bequeathed "to Mrs. Walden widow of the late William Walden one hundred pounds and to each of her three children a like sum of one hundred pounds." William Walden, who was the brother of the testatrix, had died in 1857, leaving his widow with three children. In 1858 Mrs. Walden remarried, and at the date of the will had living six children by her second marriage. One of the three by the first marriage had died in 1870, but it was shown that there had been no communication between the testatrix and Mrs. Walden for six years before 1873 :—*Held*, that the circumstances disclosed an intention to benefit only the three children by the first marriage. Illustrations.

And see *In re Emery's Estate*, *supra*.

On the other hand, in *In re Stephenson, Donaldson v. Bamber*, [1897] 1 Ch. 75, the facts were as follows : The testator by his will made a gift of the residue of his estate to "the children of the deceased son (named Bamber) of my father's sister share and share alike." The testator's sister had had in fact three sons named Bamber, all of whom had died before the date of the will, leaving children living at the death of the testator :—*Held*, that as there was no intention here of benefiting the children of all the testator's aunt's deceased sons named Bamber, but only the children of one of them, the rule as to mistakes in the number of a class intended to be benefited did not apply, but that there was an equivocation as to which of three sons' children were to be benefited, and since no extrinsic evidence was tendered to solve this equivocation, the gift failed for uncertainty.

The rule stated in the article does not apply in the case of a gift to a class of relations where such relations are

**Art. 17.** illegitimate. In such circumstances as we have seen, no natural relative can take as such until he shows to the satisfaction of the court that he was intended to take. Thus, in *In re Mayo, Chester v. Keirl*, [1901] 1 Ch. 404, a testator left legacies to the “three children respectively of Caroline Lewis born prior to her marriage with her present husband.” Besides three children of which the testator was the reputed father, Caroline Lewis had a fourth child born before she became acquainted with the testator, of whose existence it was not clear that the testator was aware: —*Held*, that that child was not included in the gift.

In that case a further point was raised, namely, whether direct extrinsic evidence of the testator’s intention could be given to rebut the presumption of mistake. The court rejected this evidence. As there was no presumption of mistake this was clearly right. But if the children had been legitimate it is not certain that direct evidence of intention could not be given to support the express terms of the will. Such evidence is constantly admitted to rebut the presumption that a legacy has been adeemed or that a person was intended to be an implied trustee of property bought in his name or transferred to him.

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ART. 18.—*Period of Distribution among Class.*

In the case of a gift to a class, the time when the gift is to take effect in enjoyment is called the period of distribution.

When the period of distribution is the date of the instrument of gift coming into operation, the gift is said to be immediate; when it is a date subsequent to

the instrument coming into operation, it is said to be **Art. 18.**  
postponed.

" You may have to take a testator's death as the time Authority.  
when the class is ascertained ; but if there is a life estate  
which prevents the distribution of the fund till the life  
estate is over, then you look to the period of distribution  
which is, in that case, the determination of the life estate,  
and then you find, not who the persons who will take are,  
but you fix the maximum number of which the class can  
consist, and then divide the shares, as far as they are  
divisible upon that footing. . . . In the case of a  
life estate the period of distribution is usually the death of  
the tenant for life, but the period of distribution is not  
necessarily the determination of the life estate. The period  
at which the fund has to be distributed is the time that  
actually has to be taken" (*per* NORTH, J., in *In re*  
*Knapp's Settlement*, *Knapp v. Vassall*, [1895] 1 Ch. 91,  
at p. 96).

The existence of an annuity charged on the residuary  
estate of a testator does not postpone the period of  
distribution of the residue. Thus, in *In re Whiteford*,  
*Inglis v. Whiteford*, [1903] 1 Ch. 889, W. had three sons,  
H., S., and B. On H.'s marriage, W. advanced £4,000 and  
covenanted to leave £6,000 to H. By his will, W., after  
giving his wife an annuity, left his residuary estate  
equally to H., S., and B., but directed that the £4,000  
advanced and the £6,000 to be left to H. should be taken  
into hotchpot on W.'s widow's death :—*Held*, that in  
calculating the interest on the £10,000 received by H.,  
the period of distribution was to be taken as W.'s and  
not W.'s widow's death.

**Art. 19.****ART. 19.—***Ascertainment of Class where Gift is specific.*

Where a series of gifts of a specific amount is made to each member of a class, whether such gifts are immediate or postponed, no person can *prima facie* be entitled to take under it who did not belong to the class when the instrument came into operation.

Illustration  
and author-  
ity.

In *Rogers v. Mutch* (1878), 10 Ch. D. 25, E. H. bequeathed “the sum of £100 to each of the children of my niece E. M., who shall live to attain the age of twenty-three years.” At the death of E. H., E. M. had no children. In an action to administer E. H.’s estate, a question arose whether any, and if so what, amount should be set aside to answer the legacies to the “children” of E. M.:—*Held*, that no sum need be set aside, since no children born to E. M. after E. H.’s death could be entitled to take under the gift. *JESSEL, M.R.*, in giving judgment said: “The rule is a rule of convenience; unless you adopt it, you cannot divide the estate. In *Ringrose v. Bramham* (1794), 2 Cox. 384, there were children living at the death of the testator, but the same rule applies where, as in the present case, there are no children living at the testator’s death. If in such case, you are to let in children born after the death, the estate is no more divisible in the one case than in the other, and so Lord HATHERLEY, when Vice-Chancellor, points out in *Mann v. Thompson* (1854), Kay, 638.”

Rule applies  
to both deeds  
and wills.

The rule applies equally to gifts by deed. See the reasoning in the judgment of *NORTH, J.*, in *In re Knapp’s Settlement*, *Knapp v. Vassall*, [1895] 1 Ch. 91.

ART. 20.—*Ascertainment of Class where Gift is general.*

When a general gift is made among the members of a class, the following rules apply :

- (1) If it be immediate, no person can be entitled *prima facie* to participate in it who was not a member of the class when the instrument of gift came into operation, provided there was any person then in existence belonging to the class.
- (2) If it be postponed, then any person becoming a member of the class after the instrument of gift came into operation, and before the period of distribution, may also be entitled to participate in the gift.
- (3) Where, in the latter case, the gift is of the *corpus* of property, and the postponement of the enjoyment is due to the conditions attached to the gift, then for the purpose of determining who can participate, the period of distribution will be the time when the conditions are so far performed as to entitle any member of the class to the enjoyment of his share of the gift.

“ Where a will contains an immediate gift to the children of a living person, and nothing more, and there are children living at the death of the testator, those children only take (*Viner v. Francis* (1789), 2 Cox, 190 ; *Davidson v. Dallas* (1808), 14 Ves. 576). If, however, the period of distribution is postponed, the gift will apply, not

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only to the children living at the death of the testator, but also to those born before the period of distribution (*Andrews v. Partington* (1791), 3 Bro. C. C. 401; *In re Emmet's Estate* (1880), 13 Ch. D. 484), those living at the death of the testator taking vested interests liable to be divested *pro tanto* by the birth of each additional child (*Oppenheim v. Henry* (1853), 10 Hare, 441; *Baldwin v. Rogers* (1853), 3 D. M. & G. 649). In *Andrews v. Partington*, *supra*, the bequest was to the children of A., the daughters' shares to be paid at twenty-one or on marriage, and the sons' shares at twenty-one. It was therefore a case where the gift and direction as to payment were distinct. The same rule has been applied in cases where the gift was contingent. In such cases, all who come into existence before the first member attains a vested interest will (if the contingency is satisfied as regards them) be entitled to share (*Whitbread v. Lord St. John* (1804), 10 Ves. 152; *Gilbert v. Boorman* (1805), 11 Ves. 238; *Clarke v. Clarke* (1836), 8 Sim. 59; *Gillman v. Dannt* (1856), 3 K. & J. 48; *per* STIRLING, J., in *In re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197, at p. 202).

Who constitute the class when gift is general.

First part of rule.

Second part of rule.

Third part of rule.

This article sets out the rule adopted by the courts for the purpose of ascertaining who are to be included in a class where a gift is made to it generally, as for example a gift of £10,000 "to my sister's children." The rule consists of three parts. The first deals with immediate gifts, that is, gifts the enjoyment of which is not postponed till some period after the instrument comes into operation, either by the nature of the property given, as for example, its being a reversionary interest, or by the nature of the conditions attached to the gift, as for example, by a condition that it shall not be paid to any member of the class until he or she attains the age of twenty-one. The second part deals with gifts the enjoyment of which is postponed to some period after the instrument of gift comes into operation, which period is usually called the period of distribution; and the third part deals with the question

as to when this period of distribution is to be assumed to have arrived when the shares of the different members of the class may by the conditions attached to the gift become distributable at different times, as for example when the members of the class are of different ages, and each member's share is to be paid to him on his attaining twenty-one. The rule applies equally to settlements by deed (*In re Knapp's Settlement*, *Knapp v. Vassall*, [1895] 1 Ch. 97).

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#### PARAGRAPH (1).

As to this first part of the rule the law is clear and simple. Provided there is or are any member or members of the class to take the gift when the instrument of gift comes into operation, then that member or those members are alone entitled to share in the gift unless an intention to the contrary appears on the face of the instrument (*Winer v. Francis* (1789), 2 Cox, 190). And the rule applies whether the gift is of the *corpus* or merely of the income of property (*In re Powell, Crosland v. Holliday*, [1898] 1 Ch. 227).

First part of rule: Immediate gifts.

In the case last cited, a testator directed the trustees of his will to pay the annual profits of a third portion of the residue of his estate to the children of his sister E. H., and to divide the same among them equally during their lives, and after their deaths, to divide the said portion equally between their children. E. H. died shortly after the testator, leaving several children. The trustees of the will then applied to the court to decide whether the gift over to the children of the children of E. H. was good. It was contended by the testator's next-of-kin, relying on *In re Wemmoth's Estate*, *Wemmoth v. Wemmoth* (1887), 37 Ch. D. 266, that it was bad, as violating the rule against perpetuities, since being a gift only of the income, and not of the *corpus* of the estate, the rule that the gift, being immediate, vested only in the children living at the testator's death did not apply, and that as, therefore, a child of E. H.,

Illustrations.

**Art. 20.**P<sup>USA</sup>. (1).

born after the death of the testator would be entitled, the limitation over to the child of such a child was bad : *Held*, that the limitation to the children of E. H.'s children was good, as the gift of income vested only in the children living at the testator's death. KEKEWICH, J., in delivering judgment, said : " All the children," is intended to mean 'all the children living at the testator's death.' No lawyer could doubt that a gift of a sum of money to the 'members of a club' would extend only to those who fulfilled the description at the time of the testator's death . . . CHITTY, J., in *In re Wenmoth's Estate*, *Wenmoth v. Wenmoth*, *supra* (and see *infra*, p. 86), was dealing solely with the rule which fixes the period of distribution among children at the time when the first child becomes entitled. It is that rule which he declines to extend to a case where income only is given, and I do not think it occurred to him to consider in any way whether it would be right to depart from the rule as to children being ascertained at the testator's death because they were only interested in income, or for any other reason. . . . I therefore hold that, under the gift of income, only the children of Elizabeth Holmes living at the testator's death take, and that the gift over to the children of such children is not void for remoteness, and there must be a declaration to that effect."

First part of rule applies equally to direct gifts and appointments.

The rule on this point applies equally to direct gifts by will or deed, and gifts by way of appointment. Thus, on an immediate bequest to such of the children of A. as B. shall appoint, B. can appoint among such children only of A. as were in existence when the testator died (*Paul v. Compton* (1803), 8 Ves. 375).

Rule does not apply where no member of class in existence.

The rule does not apply where there is no member of the class in existence when the instrument of gift comes into operation, in this respect differing from the rule as to specific gifts to members of a class. When the instrument is a will, if there is no person in existence to take under it, then in the absence of an expression of a different inten-

tion, all persons who at any time become members of the class indicated, would become entitled to share in the gift (*Harris v. Lloyd* (1823), T. & R. 310). When the gift is by deed, then, if the limitation be directly to a class not in existence, the gift, of course, fails (*Crone v. Odell* (1811), 1 Ball & B. 449, at p. 458). But where the gift is by way of use or trust in the case of realty, or by way of trust in personalty, there seems to be no reason why the same rule should not apply as applies to gifts by will. The same rule undoubtedly applies where there are members of the class in existence, and they only are entitled to take (*Warren v. Johnson* (1672), 2 Rep. in Ch. 69).

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 PARAG. (1).

The rule may, of course, be excluded by express words as in *Scott v. Lord Scarborough* (1838), 1 Beav. 154, where the limitation was “to all grandchildren now born or hereafter to be born during the lifetime of their respective parents.” Here a definite period is fixed—the lifetime of the parents—and so no difficulty arises as to the class to be included: but where the words are merely “born or hereafter to be born,” or other like words, it is hardly settled whether they are sufficient to indicate an intention on the part of a testator to admit children born after his death. In *Butler v. Lowe* (1839), 10 Sim. 317, it was held they were not, the court holding that they showed only that the testator contemplated children to be born after the date of his will, and before his death. A contrary decision was come to in *Mogg v. Mogg* (1815), 1 Mer. 654, and in *Gooch v. Gooch* (1853), 3 D. M. & G. 366, but these decisions were not followed in *Arncliffe v. Ashton* (1869), 20 L. T. 102, where, however, the court held that to include children born after the testatrix’s death would prevent the other trusts of the will being carried out.

First part of rule:  
Exclusion by express words.

It is submitted that whatever may be the case in a will, in a deed a gift to children born and to be born, or in like words, must be construed to include afterborn children, since the deed comes into operation immediately on

**Art. 20.** execution, and if the words “to be born” do not mean to be  
**PARA. (1).** born after execution of the deed, they can have no meaning  
 whatever.

#### PARAGRAPH (2).

Second part  
 of rule :  
 Postponed  
 gifts.

The second part of the rule is equally clear and certain. When the gift is postponed, whether the postponement arises through conditions expressly attached to the gift, as, for example, by a condition that the share of each member of the class is to be paid to him only on his attaining the age of twenty-one (*Andrews v. Partington* (1791), 3 Bro. C. C. 401), or through the nature of the property given, as by its being a remainder following a life estate (*Harvey v. Stracey* (1852), 1 Drew. 73), in the absence of any words in the instrument of gift to the contrary effect, all persons who were members of the class at the time the instrument came into operation, or who became members of it before the period of distribution, belong to the class in whose favour the gift accrues. If the postponement arises through the property given being reversionary in its nature, it makes no difference whether the interest in possession was or was not created under the instrument of gift (*Walker v. Shore* (1808), 15 Ves. 122). Nor does it matter whether the interest given in the postponed gift is vested or contingent (*In re Merrin, Merrin v. Crossman*, [1891] 3 Ch. 197, and see *Blackman v. Fysh*, [1892] 3 Ch. 209). Provided the whole gift is, in fact, postponed, the class to whom it is given will remain unfixed until it has become enjoyable in possession. If, however, the gift is partly immediate and partly postponed for the purpose of ascertaining the class, it will be regarded as an immediate gift, and only those belonging to the class when the instrument came into operation can claim under it (*Hill v. Chapman* (1791), 3 Bro. C. C. 391).

Remoteness :  
 To avoid it  
 rule is not to  
 be excluded.

Formerly, there seemed to be a disposition to disregard this rule, where the effect of observing it was to make the

gift void for remoteness. In such cases, the tendency of the court was to hold that the class to take was limited to those members of it who were existing when the instrument came into operation. See *Elliott v. Elliott* (1841), 12 Sim. 276; *In re Coppard's Estate* (1887), 35 Ch. D. 350. This, however, has now ceased to be the case, and the rule adopted in construing a gift to a class is now thus stated by Lord SELBORNE in *Pearks v. Moseley* (1880), 5 App. Cas. 714, at p. 719: "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect." See also *Cunliffe v. Braucker* (1876), 3 Ch. D. 393.

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Para. (2).

This doctrine must be taken subject to the rule as to a grant or devise being construed *cy près*. See *In re Richardson*, *Parry v. Holmes*, [1904] 1 Ch. 332; *In re Wrightson*, *Battie-Wrightson v. Thomas*, [1904] 2 Ch. 95. And in this connection it is important to note that where there is a gift to a class, and it is possible the number of the class may not be ascertained within the period allowed by the rule against perpetuities, the whole gift fails (*Pearks v. Moseley*, *supra*).

## PARAGRAPH (3).

The rule set out in the third part of the article is thus explained by JESSEL, M.R., in *In re Emmet's Estate* (1880), 13 Ch. D. 484, at p. 490. "There has," he says, "been established a rule of convenience not founded on any view of the testator's intention, that since when a child wants its share, it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is that, so soon as any child would, if the class were not susceptible of increase, be entitled to

Third part  
of rule:  
Authorities.

**Art. 20.**

Para. (3).

call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." This rule does not apply in Scotland (*Hope Johnstone v. Sinclair's Trustees* (1905), 7 F. 25).

Rule one of convenience merely.

Being merely a rule of convenience, it does not operate where no inconvenience would arise through leaving the class open after one member becomes entitled. Therefore, it does not operate where the gift is not a gift of the *corpus*, but merely of the income of property.

Does not apply to gifts of income.

Thus, in *In re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266, a testator left the income of the residue of his estate "unto and equally between my grandchildren . . . on their respectively attaining the age of twenty-one years during their respective lives, share and share alike." On the death of any grandchild (except the last survivor) who should die leaving issue, the share of such income and annual proceeds of such grandchild so dying to be paid unto and equally between his or her children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry. After the death of the last surviving grandchild, the residuary estate to be converted and the proceeds of the conversion to be divided equally amongst testator's great grandchildren living at the death of his last surviving grandchild, and attaining twenty-one. When the eldest grandchild attained the age of twenty-one, there were seven grandchildren in existence. Subsequently an eighth was born:—*Held*, that he was not excluded from the class to take. CHITTY, J., said (at p. 270): "In *Gillman v. Daunt* (1856), 3 K. & J. 48, Lord HATHERLEY, when Vice-Chancellor, said that a child 'who has attained twenty-one cannot be kept waiting for his share; and if you have once paid it to him, you cannot get it back.' Where, however, . . . the dis-

tribution is of income and not of *corpus*, there is nothing which requires the application of the rule, and the difficulty does not arise. In the case of the distribution of *corpus*, the trustees cannot ascertain what is the aliquot share of a member of the class until the class is closed, but in the case of a distribution of income, the distribution is periodical. Each member of the class, as soon as he becomes entitled, takes his share of the income, and there is no reason why the rule should be applied beyond each periodical payment. I have no difficulty, therefore, upon principle in holding that in the case of a bequest of income among a class of children to be paid on their attaining twenty-one years, the date of the first attaining twenty-one years was not the date of the ascertainment of the class, and that any child at any time attaining twenty-one years will be entitled to a share of the income." See *In re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322, where *In re Wenmoth's Estate, Wenmoth v. Wenmoth*, *supra*, is discussed and explained.

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Para. (3).

The rule applies to all cases where, by the conditions attached to the gift, the share of the different members of the class may vest or become payable (*Gillman v. Daunt* (1856), 3 K. & J. 48) at different times. Its most usual application is to gifts to children on their attaining a certain age; but it applies also to gifts on any other contingency, such as their marriage or their death leaving issue (*Barrington v. Tristram* (1801), 6 Ves. 344). The fact that the gift to the class is preceded by a life estate does not prevent the operation of the rule. In that case the class remains open till the determination of the life estate in any event. If then one of the class has attained the age or performed the other condition required, the class becomes fixed; if none has, it remains open until the condition is performed by one of the class (*Watson v. Young* (1885), 28 Ch. D. 436). And the fact that one of the class has performed the condition at the time the instrument of gift comes into operation will have the

Application  
of third part  
of rule.

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Para. (3).

effect of confining the class who can take to those members of it in existence at that time. The effect of this sometimes is to render a gift good which might otherwise be bad as contrary to the rule against perpetuities. Thus, a limitation to the children of A., a living person, on their attaining the age of twenty-five, will be good if, at the date of the instrument coming into operation, a child of A.'s has attained that age (*Pichen v. Mathews* (1878), 10 Ch. D. 264) ; but it will be bad if A. had no children at that time aged twenty-five (*In re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197).

The rule does not apply where the gift is postponed till the youngest child of a family attains a given age, unless there is an indication that by the youngest child is meant the youngest child in existence at a certain time, as "in the lifetime of the parents" (*Gooch v. Gooch* (1853), 3 D. M. & G. 366). If no such indication can be found, then it appears the class remains open while it is possible any children may be born : and children born after the youngest for the time being has attained the given age, will be included in the class to take (*Mainwaring v. Beeror* (1849), 8 Hare, 44). Nor does the rule apply where an accumulation of the income for the purpose of providing portions for the younger children is directed. Then the class remains unclosed until the period of accumulation has expired (*In re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322). Nor when there is a direction for maintenance after the eldest child has attained the age of twenty-one years (*In re Courtney, Pearce v. Forwell*, [1905] 74 L. J. Ch. 654).

The rule as to the period at which the class is to be ascertained is also applicable to the ascertainment of the class of objects of a power of appointment, *where the same class take in default of appointment*. Thus, where there is a gift in trust for A. for life, and after his death for such

of his issue as he may appoint, and in default of appointment for *his issue* equally, he can only appoint in favour of issue born in his lifetime. For the class of issue to take in default of appointment consists of issue born in his lifetime, and the power is merely a power of selection among that class (*Hockley v. Maturbey* (1790), 1 Ves. jun. 142). Where, however, the gift in default of appointment is in favour of a different class (*e.g.*, the *children* of A., who may attain twenty-one or marry), the same reasoning is inapplicable, and A. can then appoint in favour of issue to be born after his death so long, of course, as he keeps within the rule against perpetuities.

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Para. (3).

## PART III.

### DESCRIPTION OF PROPERTY.

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## CHAPTER I.

### DATE FROM WHICH WILLS AND DEEDS SPEAK.

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#### ART. 21.—*Condition of things in reference to which Descriptions of Property are Construed.*

So far as the property comprised in a document is concerned, the condition of things in reference to which the document is made is assumed, in the absence of a contrary intention, to be:

- (1) In the case of a deed the condition of things existing at the date of its execution.
- (2) In the case of a will the condition of things existing at the death of the testator.

Section 24,  
Wills Act,  
1837.

“Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak

and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will " (7 W. 4 & 1 Vict. c. 26, s. 24). **Art. 21.**

The words "with reference to the real estate and personal estate comprised in it" mean "so far as the will comprises dispositions of real and personal estate" (*per* TURNER, L.J.: *Lady Langdale v. Briggs* (1856), 2 Jur. (N.S.) 982, at p. 996). Explanation  
of s. 24.

The section "refers to the real and personal estate comprised in the will, and nothing else. It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death. Applying, then, that rule to this will, we look to see what is the real estate comprised in it? It is to be observed that the Act speaks of it—that is, the will. When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will. Be it so. The question still remains which clause carries the property, the residuary or the specific clause? If a testator devises all his lands in the parish of B., and then makes a residuary devise of all his other lands, the former devise will carry all other land which he may subsequently acquire in that parish under s. 24 of the statute, unless there is an intention to the contrary. But when we are asked to extend the words 'my cottage and land,' so as to include that which he (the testator) had not got, and that which, if he had it, would not be ordinarily described by such words, I see no reason for doing anything of the kind" (*per* LINDLEY, L.J., in *In re Portal and Lamb* (1885), 30 Ch. D. 50, at p. 55).

"I am far from expressing any doubt upon the view enunciated by Lord Justice LINDLEY. But I will assume that the will is to be construed as if it had been made on the day of the testator's death, and I will ask myself what

**Art. 21.** was the state of circumstances of the testator and his property on that day " (*per* FRY, L.J., *ibid.*, at p. 56).

Condition of things with reference to which a will and deed are assumed respectively to be made.

As has already been pointed out (see *supra*, pp. 36 *et seq.*) the court in construing a will or deed must, in order to give effect to it, take into consideration the condition of things in reference to which it was made. In construing a deed it is assumed, until the contrary is shown, that the condition of things in reference to which it was made was the actual condition of things at the time it was made. In construing a will, as far as descriptions of property in the will are concerned, this rule is departed from. It is assumed that the testator, knowing that his will would not come into effect till his death, intended the descriptions of property in it to be applicable to the property of his which answered such descriptions, not at the date of execution, but at his death. This was always the rule of construction so far as gifts of pure personalty were concerned, and it was extended to gifts of land by s. 24 of the Wills Act, 1837.

Illustrations  
*in re* wills.

Thus, a bequest of "my shares in the Great Western Railway" will include all such shares held by the testatrix at her death whenever she may have acquired them (*Trinder v. Trinder* (1866), 1 Eq. 695), and in the same way a general devise of "all my freehold lands" will carry all freehold lands held by the testatrix at her death (*Lady Langdale v. Briggs* (1856), 2 Jur. (N.S.) 982). Not only so, but a release by will of all debts owing by A. to the testator will include not merely the debts owing at the date of the will, but all others subsequently contracted by A. (*Everett v. Everett* (1877), 7 Ch. D. 428). Further, a bequest of the income of the testator's share in a business carried on by him at the date of the will in co-partnership with two other persons will, if the testator before his death buys out the other partners, operate as a bequest of the whole income of the business (*In re Russell, Russell v. Chell* (1882), 19 Ch. D. 432). And a bequest of "all my

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term and interest in the leasehold dwelling-house and premises known as " B. G., will, where the testator who at the date of the will had a lease for ninety-four years at a ground rent, and he subsequently buys the fee simple, carry the fee simple (*Sarton v. Sarton* (1879), 13 Ch. D. 359. *Cf. In re Knight, Knight v. Burgess* (1887), 34 Ch. D. 518). And a bequest of " all my leaseholds situate at C," charged nevertheless with the payment of all mortgage debts charged thereon, and " also with the payment of the annuity of £9 now charged thereon in favour of my sister," where the testator at the date of his will had two leaseholds at C., one subject to a mortgage and the other subject to the £9 annuity to his sister, was held to pass a third leasehold at C., which the testator acquired after his will and before his death (*In re Ord, Dickinson v. Dickinson* (1879), 12 Ch. D. 22, and *cf. Re Potter, Stevens v. Potter* (1900), 83 L. T. 405).

The difficulties as to the application of this rule arise chiefly on the question of contrary intention. Usually such difficulties arise in connection with the construction of wills. Where a deed refers to a different condition of things from that existing at its execution, the words of the instrument are, as a rule, clear enough to prevent doubts on the point arising. But in wills the testator, as often as not, has in his mind at the time he executes his will, the condition of his property then, and not its possible condition at his death, and consequently his language is not properly applicable to the later condition of his property. This constantly gives rise to the question, has he sufficiently indicated that the property he intended to refer to under a given description was only the property as it existed at the time he made his will? If he has not done so, then the presumption of law prevails, and it is assumed that he intended to deal with the thing answering the description as nearly as possible at the time of his death.

Will speaking from death :  
Contrary intention.

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Contrary  
intention  
shown by  
reference to  
date of will.

The intention to deal only with the property answering the description at the date of his will is usually shown by a direct reference to the date of the will in the will itself, or by the description being such as to identify the thing intended with a thing as it then existed. In order that the first of these may be sufficient, the reference to the date of the will must be such as to leave no doubt as to the testator's intention. For instance, a devise of "such lands in Kent as I owned at" date of will would no doubt carry no after-acquired lands in Kent. But it is doubtful if such a phrase as "which I now own" would be enough to do so. It was held in *Cole v. Scott* (1849), 1 Mac. & G. 518, that it would be enough; but that case has not been since treated with much respect. See *Castle v. Fox* (1871), L. R. 11 Eq. 544, *per* MALINS, V.-C.; *Sarton v. Sartou* (1879), 13 Ch. D. 359, at p. 361, *per* MALINS, V.-C.; and *In re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, at p. 107, *per* NORTH, J. Again, in *Lord Lilford v. Pouys-Keck* (1862), 30 Beav. 300, where the words were, "I give all my freehold estate and I give the copyhold estate which I now have or shall hereafter have," were held to pass after-acquired freeholds as well as after-acquired copyholds in spite of the difference in the form of the bequests, which can hardly be explained on any other supposition than that the testator intended merely to pass the freeholds he had at the date of his will. Indeed, there seems to be a tendency on the part of the courts to read words indicating the present time, such as "lands I am seised of" (*Doe v. Walker* (1844), 12 M. & W. 591; "shares I now possess" (*Hepburn v. Skirring* (1869), 4 Jur. (N.S.) 651; *Wagstaff v. Wagstaff* (1869), 8 Eq. 229), as referring to the date not of the will, but of the death of the testator, on the ground that by s. 24 of the Wills Act the will is to be read as if it were made immediately before the testator's death. See *per* MALINS, V.-C., in *Castle v. Fox, supra*. Whether this tendency or

the ground of it is correct is doubtful after the explanation given by LINDLEY, L.J., of s. 24, in *In re Portal and Lamb* (cited, *infra*, p. 121). And see *Re Edwards, Rowlands v. Edwards* (1890), 63 L.T. 481. The more correct rule would appear to be that recognised by NORTH, J., in *Re Champion, supra*, in which while holding that “now in my occupation,” and such like expressions, refer to the date of the will, still unless they are an essential part of the description they should not be taken as limiting it to things within it at the date of the will. And see *In re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726, at p. 734.

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Where the specific description is such that it can apply properly only to a particular thing as it existed when the testator made his will, then that only will pass under it (*Higgins v. Dawson*, [1902] A. C. 1). Thus, in *In re Knight, Knight v. Burgess* (1887), 34 Ch. D. 518, a testator at the date of his will was living in a house held for a term of seven years at a rackrent. He bequeathed to his wife “all the plate linen china glass wines liquors furniture and other household effects which shall be in and about the dwelling-house in which I shall reside at the time of my decease together with the lease of such house . . . absolutely.” After the execution of his will he bought a freehold house, held at a peppercorn rent on fee farm grant, to which he removed, and in which he resided at the time of his decease :—*Held*, that as what was bequeathed was the lease of the house in which he resided, not the house itself, and as there was no lease of the new house, that house did not pass under the bequest (*sed quare*, cf. *Sutton v. Sutton* (1879), 13 Ch. D. 359 ; *Cox v. Bennett* (1868), L. R. 6 Eq. 422 ; *Miles v. Miles* (1866), L. R. 1 Eq. 462).

Contrary  
intention  
shown by  
specific  
description.

Again in *In re Portal and Lamb* (1885), 30 Ch. D. 50, a testator, who at the date of his will owned a small cottage and some twenty-two acres of rough land at S. W.,

**Art. 21.** bequeathed “my cottage and all my land at S. W. . . . on condition that no fir or other trees or shrubs thereon be cut down and removed and that the boundary fences be kept in good preservation and the plantation heather and furze all preserved in their present state.” Afterwards, he contracted to purchase a house of considerable size and some ten acres of land contiguous to the cottage :—*Held*, that the description applied properly only to the cottage and rough land, and that the house and other land passed to the residuary devisee. And see *Emuss v. Smith* (1848), 2 De G. & Sm. 722.

Again, in *Webb v. Byng* (1855), 1 K. & J. 580, the testatrix by her will devised “Quendon Hall Estates.” At the date of the will this name definitely applied, in the mind of the testatrix, to certain estates. Subsequently, she purchased adjoining lands. There was nothing to show that she intended them to be considered as additions to her Quendon Hall estates :—*Held*, that they did not pass under the devise. *Cf. Castle v. Fox, supra.*

Sale and repurchase of thing specifically bequeathed.

It may be noted that where property is specifically bequeathed, and after the execution of the will the testator sells it, it is thereby adeemed, and should he repurchase it again before his death it will not, notwithstanding s. 24, go under the description. Thus, a testator who, at the date of his will, had £1,000 guaranteed stock in the N. B. Railway, bequeathed to A. “my one thousand N. B. Railway preference shares.” Subsequently he sold his guaranteed stock and bought by different purchases shares and stock in the N. B. Railway to a greater amount than £1,000 :—*Held*, nevertheless, that this stock did not pass to A. (*In re Gibson, Mathews v. Foulsham* (1866), L. R. 2 Eq. 669). Again, in *In re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100, a testator, who was tenant for life of certain real estate, by his will appointed under a special power of appointment this real estate. Subsequently he sold, as life tenant, part of the real estate so

appointed :—*Held*, that the purchase-money did not pass. This rule, however, applies only where the devise or bequest is specific. “Where the bequest is of that which is generic, of that which may be increased or diminished” the mere use of the word “my” would not be sufficient either to show that after-acquired property of the same kind would not go under the devise or bequest, or to make the sale of the thing bequeathed an ademption, so as to prevent it going under the bequest if afterwards repurchased (*per* WOOD, V.-C.: *Goodlad v. Burnett* (1855), 1 K. & J. 341).

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## CHAPTER II.

## DESCRIPTIONS OF PROPERTY GENERALLY.

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ART. 22.—*Descriptions of Property include Accessories of Property.*

Unless a contrary intention appears, all descriptions of property are assumed to apply to the property described as it is, or is intended to be, enjoyed in the condition of things with reference to which the instrument was made. Accordingly, in order to pass it is not necessary to mention in the description of property granted or devised :

- (1) Any right, easement, or profit which is legally incident to the property described, or,
- (2) Any quasi easement or privilege over other property owned by the grantor or testator up to the date of the grant or death of the testator, which till that time was openly and continuously used in connection with, or is reasonably necessary to the enjoyment of, the property described in the condition of things with reference to which the instrument was made.

Explanation  
of rule.

In this article it is attempted to sum up as shortly as possible the effect of the two maxims, "*accessorium non*

*ducit, sed sequitur, summ principale,*” and “a grantor cannot derogate from his own grant.” It is submitted that the foundation of both these rules is, that when a man grants property he is assumed to grant it as it is enjoyed at the time of the grant, or as it appears from the instrument it is intended to be enjoyed by the grantee. That is, the condition of things with reference to which the grant was made, determines what rights, besides those expressly set out, passed under the grant. The law now, so far as conveyances of land are concerned—and the rules have reference almost exclusively to grants of land—is declared by s. 6 of the Conveyancing Act, 1881. The law is the same when the grant is by will (*Phillips v. Low*, [1892] 1 Ch. 47).

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Neither rule is, strictly speaking, a rule of construction. *Ex hypothesi* there is nothing on the face of the instrument referring expressly to the matter, and therefore it cannot be by construction of the words that this meaning is given to them. It is by looking to the condition of things with reference to which the words are used that it is seen what was meant to be included under them. See *Birmingham, Dudley, and District Banking Co. v. Ross* (1888), 38 Ch. D. 295.

Rule not one of construction, strictly speaking.

### PARAGRAPH (1).

As to the first part of the article, the rights, easements, and profits which are legally incident to property, are generally those which are appendant and appurtenant to land. By appendant is meant annexed to the land by prescription; by appurtenant, annexed to it by some other mode of acquisition (Co. Litt. 126 b). The law as to this rule is well stated in Shep. Touch. 89. “The incident, accessory, appendant, and regardant shall, in most cases, pass by the grant of the principal without the words *cum pertinentiis*, but not *i concesso*, for the principal doth not pass by the grant of the incident. . . . Therefore, by

Rules as to easements, the appendant and appurtenant

**Art. 22.** the grant of a reversion, without naming the rent, a reversion after an estate tail for life or for years, and the rent reserved upon the estate will pass . . . but by the grant of the rent the reversion will not pass. So, by the grant of a manor, the Court Baron thereunto belonging will pass ; by the grant of a house or ground, the ways thereunto belonging do pass ; by the grant of arable land, the common appendant thereto will pass ; by the grant of mills, the waters, floodgates, and the like that are of necessary use to the mills do pass ; by the grant of a house, the estovers appendant thereunto will pass ; by the grant of a manor, the advowsons appendant and villains regardant thereunto, will pass (*sed quare*, see *Higgins v. Grant* (1585), Cro. Eliz. 18) ; by the grant of a fair, the Court of Piepowders will pass ; by the grant of homage or rent the fealty will pass ; and by grant of escuage, homage and fealty will pass."

Effect of  
adding with  
appur-  
tenances.

As to what is the effect of adding to the description of the property assured, such words as "with all its appurtenances," see *James v. Plant* (1836), 6 N. & M. 282 ; and notes to *Smith v. Martin* (1671), 2 Wms. Saund. 400. As to the extended meaning the phrase may have in a will, as compared with a deed, see *Cuthbert v. Robinson* (1882), 46 L. T. 57.

Illustrations  
of application  
of rule.

A common instance of the application of this rule is in the case of grants of land abutting on highways or non-tidal rivers. The rule is that the owner of the land abutting on a highway or non-tidal river is presumed to be owner of the soil of the roadway or the bed of the river to the middle line. When such an owner grants away his land, though there is no reference to the soil of the road or the bed of the river in the conveyance, and even though the plan on the margin of the deed delineates the land granted as going up only to the side of the road or river, yet the half of the road or bed passes under the grant unless there is something in the deed or in the circum-

stances to show that this was not intended (*Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133). The same principle applies where the highway is a street in a town (*In re White's Charities, Charity Commissioners v. London Corporation*, [1898] 1 Ch. 659), but not where the land, though intended to be used as a road, has not been in fact dedicated to the public (*Leigh v. Jack* (1879), 5 Ex. D. 264). It was once doubted whether this presumption applies in an award under an Inclosure Act (*Ecroyd v. Coulthard*, [1897] 2 Ch. 554), but it has now been settled that it does (*Newerson v. Peterborough Rural District Council*, [1901] 1 Ch. 22).

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Para. (1).

A good example of the sort of circumstances which will be held to rebut this presumption in a deed or will is afforded by *Pryor v. Petre*, [1894] 2 Ch. 11. *Cf. Mellor v. Walmesley*, [1905] 2 Ch. 164. There, in a grant of land abutting on a highway, the acreage of the land granted did not include the highway *ad medium filum*, nor did the map drawn in the margin. Moreover, in the schedule to the deed the land granted was described by numbers taken from the ordnance map, in which different numbers represented the highway. There were trees on the land granted, and also on the side of the highway abutting on it, and it appeared from the recitals that one of the conditions of sale was that the trees on the land sold were to be taken at a valuation, that the trees had been valued, and the amount of the valuation was as given. This did not include the trees growing on the highway:—*Held*, that the presumption that half the highway passed under this conveyance was rebutted. The fact that the half of the highway was not included either in the acreage or in the map would not be in itself sufficient (*Berridge v. Ward* (1861), 10 C. B. (N.S.) 400); but the additional circumstance that the trees on the highway were not to be paid for under the valuation together with that fact was enough to show the half of the highway was not intended to pass by the conveyance.

Illustration  
of what will  
rebut applica-  
tion of rule.

**Art. 22.****Para. (1).**

Again, a right may pass under a grant where such right is one of user which the law recognises as belonging to the grantee's estate. Such, for example, is the right to cut timber which passes to the tenant for life when land which is a timber estate is settled (*Dashwood v. Magniac*, [1891] 3 Ch. 306). And so also is the right which a life tenant has to work mines where the mines were open when the estate was settled (*In re Chaytor*, [1900] 2 Ch. 804). In both cases these rights pass even when the life tenant is expressly made impeachable for waste. As to easements, see *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; *Quicke v. Chapman*, [1903] 1 Ch. 659.

## PARAGRAPH (2).

Rule in  
second part  
of article.

The second part of the article refers to the rights impliedly granted over adjoining land which belonged to the grantor at the time the land described in the instrument was conveyed to the grantee or was conveyed by him to a third person simultaneously with the conveyance to the grantee (*Rigby v. Bennett* (1882), 21 Ch. D. 559, at p. 567). Here the extent of the rights impliedly granted depends on whether the condition of things with reference to which the instrument was made was simply their condition when it came into operation, or was a condition which the parties contemplated for the future. If the former, then the only rights which passed were the rights actually and visibly used with and "necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant" (*per* Lord CAMPBELL, in *Ewart v. Cochrane* (1861), 4 Macq. Sc. App. 117, at p. 122); if the latter, then a right is impliedly granted to the grantee to restrain the grantor or his assigns from doing on the adjoining land anything which will interfere with the condition of things expressly intended to be established in the future (*Birmingham, Dudley, and District Banking Co. v. Ross* (1888), 38 Ch. D. 295).

And the rule applies equally when the vendor is a mortgagee selling under the statutory power (*Born v. Turner*, [1900] 2 Ch. 211). Art. 22.  
Para. (2).

As to what are rights actually and visibly used with and "necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant," such rights as rights to the admission of light and air to windows, doors and chimneys of a house on the land granted over the adjoining land of the grantor (*Rosewell v. Pryor* (1705), 6 Mod. 116), rights of support to buildings on the land by the adjoining soil or building belonging to the grantor (*Dalton v. Angus* (1881), 6 App. Cas. 740; *Lemaître v. Davis* (1881), 19 Ch. D. 281), rights to discharge water on or to receive water from the grantor's adjoining land (*Ewart v. Cochrane* (1861), 4 Macq. Sc. App. 117), are all what are called, when they have become legal rights, continuous and apparent easements, and they all pass when an owner of two tenements conveys one without specific reference in the grant. A right of way of necessity also will pass. But a right of way of convenience over the adjoining land will not pass unless the right is over a formed roadway constructed for the purpose of going to and from the granted tenement (*Brown v. Alabaster* (1887), 37 Ch. D. 490; *cf. Titchmarsh v. Royston Water Co.* (1900), 81 L. T. 673; *Nicholls v. Nicholls* (1900), 81 L. T. 811). Nor will a precarious easement pass, such, for example, as the right to water cattle at a waterway made for the purpose of supplying a mill (*Barrows v. Lang*, [1901] 2 Ch. 502). It is to be noted that these rights are not granted to the extent they may have been used before the grant, but merely to the extent that they are necessary for the convenient enjoyment of the land granted (*per* BOWEN, L.J., in *Birmingham, Dudley, and District Banking Co. v. Ross*, *supra*). As to reservation of easements by grantor, see *May v. Bellefille*, [1905] 2 Ch. 605.

Rights within rule.

**Art. 22.**

Para. (2).  
Application  
of rule to an  
assumed  
condition of  
things.

Where the grant is made with special reference to an assumed or intended condition of things there is an implied undertaking on the part of the grantor not to do anything on his adjoining land inconsistent with this assumed or intended condition of things. Questions under this head usually arise under grants for special purposes. Thus, in a grant for buildings to be erected according to a given plan, there is an implied undertaking that the grantor shall not let down the buildings so erected by excavating the soil adjoining them (*Rigby v. Bennett* (1882), 21 Ch. D. 559). And where the grant shows that both parties contemplated that the buildings to be erected on the land granted were to have windows overlooking the adjoining land belonging to the grantor, the latter will not afterwards be allowed to obstruct such windows (*Bailey v. Icke* (1891), 64 L. T. 789; and see *Espley v. Wilkes* (1872), L. R. 7 Ex. 298).

**ART. 23.—***Descriptions of the Benefits accruing from Property, equivalent to a Description of the Property itself.*

Unless a contrary intention appears, any description which comprises *all* the benefits accruing from a property will be held to be equivalent to a description of the property itself; and, accordingly, any interest given in, or charge imposed upon such benefits, will be held to be an interest or charge in or upon the property itself.

Authorities

“If a man seised of lands in fee by his deed granteth to another the profit of those lands to have and to hold to him and his heirs and maketh livery *secundum formam chartæ* the whole land itself doth pass; for what is land but the profits thereof; for thereby vesture herbage trees mines and all whatsoever parcel of that land doth pass” (Co. Litt. 4b).

“ *Prima facie* a gift of the produce of a fund is a gift of that produce in perpetuity; and is consequently a gift of the fund itself, unless there is something upon the face of the will to show that such was not the intention ” ( *per* Sir W. GRANT, M.R., in *Adamson v. Armitage* (1815), 19 Ves. 416, at p. 418).

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“ The power of appointing the income or fruit of a fund is, in my opinion, equivalent to a power over the tree which produces the fruit ” ( *per* NORTH, J., in *Re L'Hermicier, Mounsey v. Buxton*, [1894] 1 Ch. 675, at p. 676).

This rule is, in a sense, the converse of that set out in the preceding article. There the rule was that the description of the principal covered the accessories or incidents: here, that the description of *all* the accessories or incidents covers the principal. In other words, the effect of this rule is that the benefits which result from ownership practically constitute ownership, and that consequently where words are used which, literally taken, give an interest in those benefits, such words will be construed as giving an interest to the same extent in the ownership.

Explanation of rule.

In order that the rule may apply, the description of the accessories or incidents must be such as to include *all* the benefits arising from ownership. If it applies only to some specific benefit, or a general description is limited to less than all the benefits, the rule is excluded. Thus, the devise of the rents and profits will carry the fee or whatever interest the testator had in the land (*Doe d. Goldin v. Lakeman* (1831), 2 B. & Ad. 30). But a devise of the rent, incident to a reversion, will not carry the fee (Shep. Touch. 89), nor will a trust to raise portions out of the “annual rents and profits” of land make the portions a charge upon the fee (*In re Green, Babcock v. Green* (1888), 40 Ch. D. 610).

What necessary to application of rule.

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Rule  
relates to  
descriptions  
of property  
not to extent  
of interest  
passed.

The rule is the same, whether the grant or charge is by will or deed (*Backhouse v. Middleton* (1681), 1 Cas. Ch. 173), and whether the property granted or charged is realty or personalty (*Jenings v. Baily* (1853), 17 Beav. 118), and whether the income be given or charged directly or through a trust (*Halg v. Swiney* (1823), 1 Sim. & Stu. 187). Owing, however, to the different rules as to words of limitation in deeds and wills, and in respect to realty and personalty (see *infra*, pp. 197 *et seq.*), and owing to there being no estates at common law in personalty, this rule is often confused with those regulating the extent of the interest which passes where no words of limitation are used. But it is essentially a rule referring to the description of the property and not to the extent of the interest which passes. The rules dealing with words of limitation apply equally in fixing the extent of the interest which passes, whether the property described is described by words applying to the *corpus* or words applying to the income or profits.

Grant of the  
exclusive use  
of property  
passes the  
property  
itself.

An instance of the rule is afforded by the case of *Reilly v. Booth* (1890), 44 Ch. D. 12. There M. and others were owners in fee of a house fronting a street, and also of a yard and premises in the rear. A covered passage or gateway led from the street through the houses to the premises in the rear. They conveyed the premises in the rear “together with the *exclusive use* of the gateway” to W. in fee. It was held by the Court of Appeal that W. was entitled, not merely to a right of way through the gateway, but to the gateway for all lawful purposes, and *semble* that such a right amounted to the ownership of the space within the gateway.

Illustrations  
of application  
of rule.

Gift of right  
to occupy  
house or  
land.

A common instance of the application of this rule is that of a testator devising his dwelling-house to the use that his widow may live in and occupy the same during her life. Such a gift as this, unless the contrary appears, confers an ordinary life estate on the widow. She is

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under no obligation to occupy personally the house, but may let or sell her interest in it (*Rabbeth v. Squire* (1859), 4 De G. & J. 406). In the words of Lord HALSBURY, C., in *Coward v. Larkman* (1888), 60 L. T. 1, at p. 2, “the free use and occupation of a house seems to be as much within the rule . . . as the income from an estate.” And this rule applies whether the right to occupy is given by will or deed or is reserved to the grantor under a grant of the house. “A licence to occupy an estate for a particular time is a lease of the whole estate for that time” (*Ree v. Inhabitants of Easington* (1791), 4 T. Rep. 177, at p. 182).

It should be noted that while, as we shall see, a gift of the income of personalty by will or deed, or of the rents and profits of realty by will, without words of limitation, will, in the absence of anything in the context to the contrary, pass all the donor’s interest in the personalty or realty (*infra*, p. 199), it seems doubtful whether a gift of the use and occupation of a house without words of limitation will pass more than a life estate. See *per* Lord WATSON, in *Coward v. Larkman* (1888), 60 L. T. 1, at p. 4: *cf. per* Lord HALSBURY, C., *ibid.*, at p. 3).

Another common instance of the application of the rule arises in the case of a charge of debts or portions on the rents and profits of land. As to this, the law is thus stated by JESSEL, M.R., in *Metcalfe v. Hutchinson* (1875), 1 Ch. D. 591, at p. 594: “The rule being that, where there is a trust to pay, or to raise and pay, or to raise or pay gross sums out of rents and profits, that means out of the estate; and you may sell it or mortgage it for the purpose of paying the gross sum, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for that purpose. . . . I hold it to be an established rule of construction that in a deed or will where you find a trust to pay debts or to raise and pay

Charges of  
debts on  
profits or  
income.

**Art. 23.**

debts, or to raise or pay debts out of rents and profits, that, without more, means that you may raise them by sale or mortgage." While the rule of construction, as here stated, is unquestionably correct, it may be doubted whether the reason of the rule is that given by the MASTER OF THE ROLLS. As pointed out by STIRLING, J., in *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610, at p. 614, the earlier decisions seem to go rather on the generality of the words used than on the sum being immediately payable. And see *per* HALSBURY, C., in *Coward v. Larkman* (1888), 60 L. T. 1, at p. 2. Nor is that reason quite in conformity with the decision of Lord WESTBURY, C., in *Phillips v. Gutteridge* (1862), 3 De G. J. & S. 332, in which he held that where the charge was of an annuity the rule applied.

Gifts of  
income to  
charities.

Sometimes the rule of construction applicable to gifts of income, where the object is charitable, is stated as if it differed materially from the rule above set out. It is usually stated something in this way: "Where a gift is made to charitable objects, and the whole income at the date of the gift is appropriated among specified charities, then any subsequent increase of income will go rateably among those charities; but if the whole income is not so appropriated, any subsequent increase will not go rateably among them, but it will go to charitable objects generally, if there is a general intention of charity disclosed in the instrument." It is submitted that, so far as this rule deals with charitable objects generally, it is not a rule of construction at all. It is really a rule of policy by which the court aids defective gifts to charities. If the court finds that a donor intended to give a certain property to charitable objects, it will not allow the gift to fail because the donor failed in whole or part to say what the charitable objects were. In so far, however, as the rule is a rule of construction at all, it is simply that stated in the above article. That was evidently the opinion of Lord ELDON. In *Att.-Gen. v. Skinners' Company* (1826), 2 Russ. 407,

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at p. 441, he says: "There are many cases which have decided that where it appears on the will itself what was the yearly value of the estates given to charitable purposes, and the testator has parcelled among the different charities the whole of that yearly rent or value so attributed to the property, any future increase of rents must go to charity. The court seems to have said that the testator has himself declared what constitutes the whole of the estate; . . . and from the circumstances of his knowing what was the then present value of the estate, and devoting it exclusively to charity, we have inferred an intention on his part that the whole of the estate should be given to charitable purposes. The doctrine of these cases is neither more nor less than this: a gift of the rents and profits of an estate is a gift of the estate itself; such a devise as I have just mentioned is a gift of the rents and profits: it is therefore a gift of the estate." The whole question, in other words, is, Did the donor intend to devote the whole property to charitable purposes? If he has devoted the whole income of the property to specified charities, then, under the rule stated in the article, he is presumed to have intended to devote the whole property too, and accordingly all increase in the value goes among the specified charities, which are the owners of the property. If he has not devoted the whole income of the property to specified charities, then if it appears in any other way that he intended to devote the whole property to charitable purposes generally, the court, as a matter of public policy, will not permit this intention to fail through any uncertainty as to the particular charities he intended to benefit (*In re White, White v. White*, [1893] 2 Ch. 41). And where he impresses upon the fund a void charge—such, for example, as a direction to apply the income of the fund first to keeping his tomb in order, and subject thereto for charitable purposes—then the whole fund is subject to the charitable trust discharged of the void charge (*In re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715).

**Art. 23.**

Words to  
make rule  
applicable  
must refer to  
benefits  
generally of  
property.

No particular words are necessary to make the rule applicable. All that is necessary is that the words used shall be such as will describe the general benefits arising out of the ownership of the land or personalty. Thus, "rents and profits" have been held, again and again, to be sufficient to pass the land; while as to personalty, though possibly "rents" would not be sufficient (*In re Green, Baldock v. Green* (1888), 40 Ch. D. 610), the gift of "dividends" has passed the stock (*Page v. Leapingwell* (1812), 18 Ves. 463) and the consols (*Stephenson v. Dowson* (1840), 3 Beav. 342) on which they were payable. The gift of the "interest" on a fund has passed the fund (*Clough v. Wynne* (1817), 2 Madd. 188), as has the gift of the "produce" (*Adamson v. Armitage* (1815), 19 Ves. 416), and "the income" (*In re L'Herminier, Mounsey v. Buston*, [1894] 1 Ch. 675).

Intention to  
exclude rule.

This rule, like any other rule of construction, applies only where no intention to exclude it appears. What will be considered sufficient evidence of such intention depends in each case on the words used in the instrument, but as an instance of what has been held sufficient, the case of *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610, may be cited. In that case a testator, after leaving all the cash in his house at the time of his death to his widow, subject to the payment of his debts, directed that in case such money should prove insufficient for such payment, the deficiency should be payable out of the "rents dividends and annual proceeds" of all his estate:—*Held*, that "rents, dividends, and annual proceeds" was equivalent to "annual rents dividends and proceeds," and that the debts were not a charge on the *corpus* of his estate. STIRLING, J., in delivering judgment, says: "The words are 'rents dividends and annual proceeds.' The primary meaning of the word 'rents' is rents accruing from year to year, there is no question as to the meaning of dividends; the other word, 'proceeds,' is limited by the word 'annual.' Then is there in the context any indica-

tion of the sense in which the testator used those words? In the first place the testator bequeaths a specific part of his estate to his wife for life with remainders over, in such terms as to make it clear that his meaning was that the *corpus* should be enjoyed *in specie*. Next, he uses the words 'rents and profits' in the gift of the *Princess Alice*, in the sense of annual rents and profits being the rents and profits until sale, plainly showing that he did not mean what Lord COWPER (in *Stanhope v. Thacker* (1716), Prec. Ch. 435, 436) termed extraordinary profits. Then he has in terms disposed of the residue of his real and personal estate: and if he intended to charge the deficiency of his debts on the *corpus* of his estate, why should he not have done so directly? Moreover, when the testator desires to charge the *corpus*, he knows how to do so—as is shown by the trust to raise a legacy of £100 for Elizabeth Dovey out of the proceeds of the sale of the *Princess Alice*. Looking at the whole of these circumstances, I am satisfied that annual rents, dividends, and profits only were intended by the words to which I have referred."

And see *In re L'Herminier, Mounsey v. Buston*, [1894] 1 Ch. 675, which shows that even where the testator draws a distinction in certain events between the income and the capital of a fund, that, in itself, does not prevent the trusts of the income carrying the capital.

## CHAPTER III.

## GENERAL DESCRIPTION OF PROPERTY.

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ART. 24.—*What is included under a General Description.*

In the absence of contrary intention, a general description of property in a will or deed will include—

- (1) Not merely interests in possession, but also interests in expectancy;
- (2) Not merely legal, but also equitable interests; and
- (3) Not merely property belonging to the testator or settlor, but also property within the general description over which he has [at the date of the execution of the instrument?] a power of appointment, provided there is anything in the instrument or in the condition of things with reference to which it was made to show that the testator or settlor intended such property to be included (*a*).

Authorities. (1) “It is now settled that a reversion in fee will pass under a general devise unless a clear intention to exclude

(*a*) This is independently of s. 27 of the Wills Act, 1837, with regard to general powers, as to which see p. 147, *infra*.

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it be shown, though it is limited in part to the same uses to which the particular estate (if I may so call it) is already dedicated " (*per* Lord ST. LEONARDS : *Tennant v. Tennant* (1844), 1 Jo. & Lat. 379, at p. 389).

(2) " Money which a testator has not got into his own hands, and which he has no right to have in his own hands and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although if he has power to dispose of such money, he can dispose of it either as land or money as he may think right. The absence of any person after his death to require an investment in land cannot be the real test of what it is in his lifetime. If he says nothing to the contrary, the money must be treated as if it were invested in land up to, and at the time of his death " (*per* LINDLEY, L.J., in *Re Duke of Cleveland's Settled Estate*, [1893] 3 Ch. 244, at p. 250).

(3) " The instrument must refer either to the power, or to the property subject to the power : or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power " (Farwell on Powers, p. 176).

" The propositions in Farwell on Powers, though substantially correct, require some qualification. It is not necessary to have a reference to the power or the property if the intention to exercise the power is otherwise clear " (*per* KEKEWICH, J., in *In re Sharland*, [1899] 2 Ch. 536).

PARAGRAPH (1).

The rule that a general description includes interests in expectancy within the description as well as interests in possession applies to settlements by deed as well as gifts by will (*Freeman v. Duke of Chandos* (1775), Cowp. 360), and to interests in expectancy in personalty as well as in realty.

Extent of application of rule.

**Art. 24.**

Para. (1).

Application  
in case of  
wills.

In the case of wills, the rule has been carried very far. Thus, in the case of *Re Egan, Mills v. Penton*, [1899] 1 Ch. 688, the testatrix, after making various gifts, added: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death, after the payment of my debts funeral and testamentary expenses, I give absolutely to C. T. W." Then she proceeded to give some specific chattels to other legatees. Part of her personalty not specifically disposed of, consisted of reversionary interests, which fell into possession five years after her death. It was held that they passed under the general bequest to C. T. W. STIRLING, J., in delivering judgment said: "The words 'that may be in my possession,' do not occur in any case previously adjudicated upon, and it is contended that, having regard to these words, I ought not to hold that the reversionary interests which are the subject-matter of the application passed under this gift of money. Now no doubt lawyers know the difference between an interest which is in possession and one which is in reversion: but the ordinary layman does not use the word 'possession' with reference to that distinction. The first meaning which is found for the word 'possession' in Johnson's Dictionary is this: 'The state of owning or having in one's hands or power property,' and that with, in some cases, slight modifications has been repeated in every other dictionary which I have been able to consult. I think that the fine distinction between such words as 'possession,' 'property,' and 'ownership,' is not one which would be present to the mind of a layman, and I do not think that the words 'in my possession' were used by the testatrix with reference to the distinction which lawyers draw between interests in possession and in reversion. I think the true view is that by this gift the testatrix intended to dispose of her whole personal estate which is not specifically given."

Unsettled  
reversionary  
interests  
within rule.

It follows from the rule that, as a general description of property will include interests in expectancy in pro-

erty coming within the description, unsettled reversions in the donor's settled lands will be included (*Atkyns v. Atkyns* (1780), 3 Bro. P. C. 408), even though the terms of the general description be property "not settled" (*Glover v. Spendlove* (1793), 4 Bro. C. C. 337). The fact that if the donor died without issue and intestate, the reversion was, under the settlement, to go to a certain person, will not prevent its passing under the general description (*Incorporated Society v. Richards* (1841), 1 Dr. & War. 258); nor will the fact that the reversionary interest is not vested but contingent (*Inghilby v. Amcotts* (1856), 25 L. J. Ch. 769); nor the fact that it was created by the will or deed itself (*Alliston v. Chapple* (1860), 2 L. T. 110).

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Para. (1).

#### PARAGRAPH (2).

As to the second part of the rule, it is clear that, under the general description, an equitable estate in property within the description will be included. Thus an equity of redemption in land mortgaged, will pass under the general description of "lands" or "real estate" (*Forrester v. Leigh* (1753), Ambler, 171). And the equitable right to land contracted to be purchased, but not actually conveyed, will pass under a similar description (*Acherley v. Vernon* (1725), 10 Mod. 518). And a fund held by trustees under a trust to invest in land will also pass under a similar description (*Re Duke of Cleveland's Settled Estate*, *supra*). Land contracted to be sold, will not pass beneficially under a general description of land, but it may under a specific devise (*In re Jackson, Wilson v. Donald* (1881), 44 L. T. 467).

Second part  
of rule :  
Extent of  
application.

#### PARAGRAPH (3).

The third part of the rule stated in the article, applies to the law relating to the execution of powers of appointment special and general, whether by will or deed, independently

Third part  
of article :  
Execution  
of powers.

**Art. 24.** of s. 27 of the Wills Act. The effect of that section will be considered separately. See *infra*, p. 147.

Para. (3).

The rule with regard to the execution of powers of appointment by a general description of property, may be summed up thus: If there be no reference to the power in the will or deed, in order that the court may infer an intention to exercise the power, the general description must be such (1) that it must refer to some specific property, and (2) that it cannot be satisfied by any other property but the property subject to the power. See *James v. Sayer* (1851), 3 Mac. & G. 606.

As to (1), a mere residuary devise can never (apart from s. 27 of the Wills Act), in the absence of all reference to the power, carry property over which the testator had a power of appointment merely. Thus, in *Re Williams, Foulkes v. Williams* (1889), 42 Ch. D. 93, a testator, after several specific bequests, left all his real and personal estate to his widow. He had no real estate of his own, but he had a power of appointment in her favour over some real estate:—*Held*, that the will showed no intention of executing the power, and that evidence was not admissible to show that, as he had no realty when he made the will, he could only have been referring to the realty which he could appoint by his will. In *Re Wait, Workman v. Petgrave* (1885), 30 Ch. D. 617, the testator left "my estates at B." to a devisee. Now here the description, though general, referred to specific property. The court accordingly admitted evidence to satisfy condition (2), viz., to show that the testator by "my estates at B." must have meant the estates there over which he had a power of appointment, since he had no estates of his own there.

Owing to condition (1) it is very seldom that a general description of personalty without any reference to the power can be sufficient to execute the power to appoint it so as to enable evidence to be admitted to satisfy condition (2). See *In re Huddleston, Bruno v. Eyston*,

[1894] 3 Ch. 595. Where, however, there is no direct reference to the power, a general reference to some power or other may be sufficient to enable the court to admit extrinsic evidence to identify the property or the power. Thus, such expressions as "I bequeath and appoint" (*In re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677), or "I bequeath all the property I can in any way dispose of" (*Re Milner, Bray v. Milner*, [1899] 1 Ch. 563), have been held sufficient to secure the admission of evidence that the testator had only one power of appointment at the date of the will, that it was over specific property, and that the objects of the power were those persons to whom such property was bequeathed.

**Art. 24.**

Para. (3).

Hitherto we have been speaking of powers of appointment in existence at the time the instrument in question was made. Whether a power not in existence when the instrument was made can be executed by even the most specific reference in such instrument to the property over which the power is afterwards acquired, is open to doubt. Special provision has been made by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), for the execution by will of subsequently acquired general powers. See *infra*, p. 147. Outside that the law is very unsettled. In *Stillman v. Weedon* (1848), 16 Sim. 26, a testator specifically referred in his will to certain property which then belonged to him, and which he bequeathed to his children. Subsequently, he by deed settled this property, retaining a power of appointment over it among his children. On his death it was held that the will was an execution of the power. The judge, however, seemed to think that s. 27 of the Wills Act, 1837 (see *infra*, p. 147), applied to all kinds of powers. In *re Hayes, Turnbull v. Hayes*, [1900] 2 Ch. 332, BYRNE, J., thought that this decision might possibly be supported on the ground that the property was specifically described, and the will must be taken to be speaking as if it were made immediately before the testator's death. In the case before himself, however, he held that the

Execution  
of future  
powers by  
anticipation.

**Art. 24.**

Para. (3).

subsequent special power was not executed by the preceding will. His decision was affirmed by the Court of Appeal ([1901] 2 Ch. 529), which, while it refused to decide whether, as a matter of law, it is possible to execute a power by anticipation, held that, if it is possible to do so, the instrument to have that effect must be so clear as to place beyond doubt the maker's intention to execute the power if and when it arises.

The rules here laid down apply to the execution of special powers, either by will or deed, and of general powers by deeds. As to the execution of general powers by wills, see *infra*, p. 147.

**ART. 25.—*What is not included under a General Description.***

A specific description of property is not enlarged by a general description contained in the same instrument. Nor will a general description include property within such general description where it appears from the general scope of the instrument that such property was not intended to be referred to.

Authorities.

“Nothing, I consider, is better settled than that these general words, even when they would pass the land *ex vi terminorum*, are restricted by the recitals, and what is called the scope of the instrument. This is illustrated by the case of *Hopkinson v. Lusk* (1865), 34 Beav. 215, before Lord ROMILLY. The principle is, that though words of specific description are not easily dealt with, yet general words are; and that though general words may be in themselves large enough” to comprise the properties in dispute, “yet if, upon the whole scope of the instrument—as to which especial regard is to be had to what I call introductory recitals—it appears it was not the intention of the parties to pass those properties, it will not pass them” (*per* JESSEL, M.R., in *Howard v. Earl of Shrewsbury*

(1874), 17 Eq. 378, at p. 391. Cited and approved by CHITTY, L.J., in *Williams v. Pinckney* (1897), 77 L. T. 700, at p. 705).

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“We gather from the decisions the propositions that general words, whether descriptive of parcels or found in the estate clause, are susceptible of being controlled or modified by other parts of the instrument, and by what has been appropriately termed the scope of the deed read as a whole, and that for this purpose negative words are not requisite. There does not appear to be any sound distinction between general words, whether found in the parcels or in the estate clause. . . . In arriving at our conclusion, we have not lost sight of the general rule, that where the operative part of a deed is clear and unambiguous, it cannot be cut down by recitals” (*per* CHITTY, L.J., in *Williams v. Pinckney* (1897), 77 L. T. 700, at p. 705).

It is to be noted that the rule deals merely with general descriptions, as opposed to specific or particular descriptions. The question, then, as to the relative effect of conflicting particular descriptions in the recitals, and in the operative parts of instruments, does not arise. As to these, however, the rule is clear. As put by Lord ROMILLY, M.R., in *Holliday v. Overton* (1852), 14 Beav. 467, “It is impossible by a recital to cut down the plain effect of the operative part of a deed.”

Extent of rule.

The rule stated in this article is akin to that stated in Article 2, *supra*, as to ambiguous words. Descriptions in general terms are always treated as ambiguous when in any way opposed to particular descriptions in any other part of the instrument, or when opposed to what appears to be the scope of the instrument. They are liable to be limited in their meaning thereby.

Rule akin to that as to ambiguous words.

The most usual instances of the application of this rule arise on the construction of deeds in connection with the

Illustrations of application of rule.

**Art. 25.** “all the estate” clause in the operative words. A single illustration of its application in this respect will suffice.

In *Williams v. Pinckney* (1897), 77 L. T. 700, A. had, subject to a life estate in B., the whole fee in certain lands. A. and B., on the marriage of C., conveyed, “according to their respective estates and interests,” the fee, “and all the estate right title claim and demand of the said A. and B. respectively in or to arise out of the same premises” to trustees by way of settlement on C. and the issue of the marriage. B. had, besides his life estate, a mortgage on the fee at the time of the conveyance. No mention of this was made in the recitals, though two other mortgages were set out:—*Held*, that B.’s mortgage did not pass.

Another common example of its application is in connection with general words added to the parcels in a conveyance. Thus, in *Jenner v. Jenner* (1866), 1 Eq. 361, a marriage settlement contained recitals of agreements to settle certain properties in Yorkshire therein specified. In the operative words, there was a conveyance of these specified properties, and “all other the freehold hereditaments (if any) in the county of York, of or to which the grantor was seised or entitled for an estate of inheritance.” The settlor owned an estate of inheritance in a freehold hereditament in Yorkshire other than any of those specified in the recitals:—*Held*, that it was not included under the general words.

And see *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *In re Hodgeon, Taylor v. Hodgeon*, [1898] 2 Ch. 545; *In re Walpole’s Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; and *supra*, p. 31.

## CHAPTER IV.

## SPECIAL RULES AS TO WILLS.

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ART. 26.—*General Gifts execute General Powers of Appointment.*

A GIFT, in a will, of property described in a general manner, whether by way of residue or not, will include not merely all property within the general description belonging to the testator, but also all property which the testator had at his death a power to appoint by his will in any manner he might think proper, unless a contrary intention shall appear by the will itself.

"A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such

Section 27 of  
Wills Act,  
1837.

**Art. 26.** description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will" (7 W. 4 & 1 Vict. c. 26, s. 27).

The words used in the section to describe the power of appointment coming within its provisions, are a power "to appoint in any manner he may think proper." This means "to appoint *by will* in any manner he may think proper" (*per* BOWEN, L.J., in *Phillips v. Cayley* (1889), 43 Ch. D. 222, at p. 233). The section accordingly does not apply to any power which does not enable the testator to appoint (1) by will; (2) without restriction as to mode of appointing; and (3) without restriction as to objects of appointment.

- (1) A power to appoint by deed only would not, while a power to appoint by will only would, be within the section (1 Sug. Powers, p. 369).
- (2) If the instrument creating the power required any express reference to the power in the will executing it, the power would not be within the section (*Phillips v. Cayley, supra*).
- (3) A power to appoint among any particular class as children, or for any particular purpose as charity, would not be within it (*Cloves v. Awdry* (1850), 12 Beav. 604).

It may be noted that s. 27 does not in any way dispense with the formalities as to signature and witnessing required by ss. 9, 10, for the valid execution of a power by will. Under Lord Kingsdown's Act a will made abroad is admissible to probate if made in accordance with the local law. The local law may not require a will to be executed with the formalities required by ss. 9 and 10 of the Wills Act. Where a will not so executed is in question, difficulties may arise as to its effect upon a general

Art. 26.  

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power to appoint property in England. The law seems for the present to be settled in this way: Where the will is admissible to probate merely through the operation of Lord Kingsdown's Act, and contains no evidence on the face of it showing that it was intended to be construed as an English will (*Hummel v. Hummel*, [1898] 1 Ch. 642), even where the effect of it, if construed by the law of the testator's domicile, would be to dispose of all the property the testator could by law dispose of (*In re Scholefield*, *Scholefield v. St. John*, [1905] 2 Ch. 408), s. 27 will not operate to make it a good execution of the power. Where, however, the will contains such evidence, s. 27 will apply (*In re Price*, *Tomlin v. Latter*, [1900] 1 Ch. 442), except when the instrument creating the power shows that execution by a will made according to English law was required (*Barretto v. Young*, [1900] 2 Ch. 339).

If the power be one within the section, it will be executed by a general devise or bequest which does not refer to it directly or indirectly. So will it be by a devise or bequest by way of residue (*Att.-Gen. v. Wilkinson* (1866), L. R. 2 Eq. 816), and even, it would seem, by the mere bequest of pecuniary legacies when the property under the power is personalty (*Hawthorn v. Shedden* (1856), 3 Sm. & G. 293; approved in *Re Wilkinson* (1869), L. R. 4 Ch. 587). And where the testator has only a power to appoint generally a portion of the fund subject to the power, a residuary or general bequest will operate as an appointment of that portion (*In re Jones*, *Greene v. Gordon* (1886), 34 Ch. D. 65).

The effect of an appointment made by residuary devise or bequest and one made by specific execution of the power is different. By an appointment made by a residuary devise or bequest, the property subject to the power becomes simply a part of the residuary estate, and so primarily liable for the payment of the deceased's debts. By a specific execution of the power, the property subject to the

- Art. 26.** power is not liable for the deceased's debts till the rest of the assets is exhausted (*Williams v. Williams*, [1900] 1 Ch. 152).

Contrary  
intention.

To prevent a general or residuary devise or bequest from operating as an appointment, it is necessary that a contrary intention "shall appear by the will." In *Re Ruding's Settlement* (1872), L. R. 14 Eq. 266, it was held that these words did not prevent the court from taking into consideration surrounding circumstances to ascertain whether there was or was not a contrary intention. This decision was dissented from in *Boyes v. Cook* (1880), 14 Ch. D. 53, where it was pointed out that the words of s. 27 prohibited the court from gathering a contrary intention from any other source than the will itself. This decision led to another error. In *Re Marsh, Mason v. Thorne* (1888), 38 Ch. D. 630, it was held, that where an instrument creating a power, expressly declared that it should not be executed by a will unless the will expressly referred to it, this power would nevertheless be executed by a general bequest in a will not referring expressly to it, since the intention not to execute the power did not appear by the will itself. This decision was overruled in *Phillips v. Cayley* (1889), 43 Ch. D. 222, where it was pointed out that the question in such a case was not whether there was any intention not to appoint on the testator's part, but whether the terms of the power—which required a special reference to the power to effect a valid execution—were complied with. *Phillips v. Cayley* has been followed in *Re Davies, Davies v. Davies*, [1892] 3 Ch. 63.

Where power  
is created  
subsequently  
to will.

Where a testator at his death possessed a general power of appointment, a general gift by his will will execute such power even when the power was conferred on him after the date of the will, and the instrument conferring it contained words showing that it was intended that the power should be executed by a future instrument

(*Airey v. Bower* (1887), 12 App. Cas. 263). A second point upon which there was some doubt (1 Jar. on Wills, p. 685), was whether s. 27 could be held to operate to defeat limitations in default of appointment in a settlement made by the testator himself subsequently to the date of his will. It was contended that, though, under s. 27, the intention not to execute the power must appear by the will, yet the will and the subsequent settlement really constituted one instrument, and in order to construe the will it was necessary to read the settlement which showed the intention to take the property out of the operation of the antecedent will. In *Airey v. Bower, supra*, the House of Lords held that in view of s. 23 of the Wills Act, which expressly enacts that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, shall prevent the operation of the will with respect to such estate or interest in such real and personal estate as the testator shall have power to dispose of by will at the time of his death, the antecedent will must defeat the subsequent deed.

Art. 26.

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The decision was upon a general power, but the principle of it would apply to special powers, provided the antecedent will displayed an intention to execute the special power within Art. 24.

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ART. 27.—*Residuary Gifts include all Property not otherwise effectively disposed of by the Will.*

(1) A gift of property in a will, described in a general manner by way of residue, will include all property within the general description which is not otherwise effectively disposed of by the will, unless a clear intention is expressed that some of this shall in no event form part of the residue.

**Art. 27.**

(2) The fact that a residuary gift is of "all other my property," or that a residuary devise is confined to real estate of a certain kind, is not sufficient to exclude from it properties bequeathed or real estate of that kind devised the gift of which has failed.

(3) But a lapsed or revoked share of residue will not fall into the residue which is effectively disposed of unless a contrary intention appears.

(4) Where after a residuary gift there is a second residuary gift of property of the same kind, the second residuary donee will only take lapsed shares of the residue.

## PARAGRAPH (1).

Authorities  
as to  
residuary  
bequests.

"I take the rule to be plain that, in general, the residuary gift carries every lapsed legacy, and every legacy which on any ground fails to take effect: but that is subject to this other rule, that if a testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention" (*per* FRY, J., in *Blight v. Hartnoll* (1883), 23 Ch. D. 218, at p. 220).

"To exclude a particular portion of the personal estate of a testator not otherwise disposed of by his will, from a bequest of his residuary personal estate, it is necessary to find an intention not to include that portion, even if it is his" (*per* LINDLEY, L.J., in *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348, at p. 357).

"*Bernard v. Minshull* (1859), John. 276, well defines what passes under a general residuary gift. It passes everything not disposed of, whether the testator has not attempted to dispose of it, or whether the disposition fails

by lapse or any other event " (*per* LOPES, L.J., *Re Bagot*, *Paton v. Ormerod*, *supra*, at p. 359).

**Art. 27.**

Para. (1).

" Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will " (7 W. 4 & 1 Vict. c. 26, s. 25).

Residuary  
devise:  
Section 25 of  
the Wills  
Act, 1837.

" The recent authorities have fully established that s. 25 of the Wills Act is to be construed upon the principle of assimilating a residuary devise of real estate with a like bequest of personalty " (*per* STUART, V.-C., in *Carter v. Haswell* (1857), 26 L. J. Ch. 576, at p. 577).

Construction  
of s. 25.

An example of a clear intention that certain property shall not be included in a residuary bequest occurs in *In re Fraser*, *Louth v. Fraser*, [1904] 1 Ch. 726. There a testator after a general bequest of his personalty to trustees, made a gift of his realty and chattels real to a brother. He afterwards added seven codicils to his will, the last of which was executed in July, 1898. In that codicil he recited that his brother was dead but he did not revoke the devise and bequest to him. He had at that time entered into a contract to buy certain rents issuing out of leaseholds:—*Held*, upon his death that these rents were chattels real and that they were undisposed of by the will. And see *Higgins v. Dawson*, [1902] A. C. 1; *Toole v. Hamilton*, [1901] 1 L. R. 383; *Re Sinclair*, [1903] W. N. 113.

A lapsed legacy falls into the residuary gift not merely when the lapse is caused by the death of the legatee before the testator, but when it fails from any other cause whatever. Thus, where accumulation of income is directed for a longer period than the law allows, the income accruing after the legal period will fall into the residue (*In re*

- Art. 27.** *Pope, Sharpe v. Marshall*, [1901] 1 Ch. 64; *Cf. In re Travis, Frost v. Gireatorex*, [1900] 2 Ch. 541; and *In re Rogerson, Bird v. Lee*, [1901] 1 Ch. 715).
- Para. (1).**

Property  
undisposed  
of through  
mistake.

The generality of a residuary gift was at one time supposed to be subject to two limitations besides that stated by FRY, J., in *Blight v. Hartnoll*, *supra*, namely, an express intention on the part of the testator that the property should be excepted in any event from the residue. The first of these limitations was that if property was undisposed of by the will through a mistake as to the facts, made by the testator, and appearing by the will, this property would not fall into the residue. Thus, if there was an untrue recital that certain property belonged to a stranger which in fact belonged to the testator, and, in consequence, the will did not attempt to dispose of it, this property would not pass under the residuary gift, but would be undisposed of by the will (*Crenitt v. Perry* (1856), 23 Beav. 275). This rule, in so far as it is a rule of construction at all, has been overruled in *Re Bagot, Paton v. Ormerod*, *supra*, where, as stated by LINDLEY, L.J., the mere fact that the testator thinks he does not own something, is not a sufficient indication of any intention on his part to exclude it from the residue. There must be evidence that he intended to exclude it, even if it was his.

Lapsed  
share of  
residue.

The second limitation is with respect to lapsed shares of the residue itself. The cases relating to this will be considered under paragraph (3).

Where lapsed  
appointments  
under a  
general power  
go into  
residue.

A general residuary gift carries not merely lapsed legacies or devises, or both, according to the extent of the gift, but also lapsed appointments under a general power to appoint. But while all lapsed legacies and devises go under the residuary gift, unless a contrary intention is clearly shown, this is not so with lapsed appointments.

As has already been pointed out (*supra*, p. 149), a residuary gift is in itself sufficient to execute a general power of appointment, even though no reference whatever

is made to the power. But if the will purports to exercise the power directly in favour of certain beneficiaries, and the appointment fails, then, whether the property intended to be appointed to them goes under the residuary gift, depends upon whether the testator has, by the exercise of the power of appointment, shown an intention "to take the property dealt with out of the instrument containing the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*per* ROMER, J., in *Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232, at p. 235). If the terms of his will indicate that he intended to take the property out of the instrument for all purposes, it will go under the residuary clause; if they do not, the persons entitled in default of appointment will take (*In re De Lusi's Trusts* (1879), 3 L. R. Ir. 232).

**Art. 27.**

Para. (1).

Where the appointment is to a trustee for the intended beneficiaries, or when the testator makes a blended fund of the property subject to the power and his own estate (*In re Marten, Shaw v. Marten*, [1902] 1 Ch. 314), that fact constitutes as a rule sufficient evidence of such intention; and if any of the beneficiaries predecease the testator, there is a resulting trust of the property appointed to them, in favour of the testator's general estate (*In re Van Hagen, Sperling v. Rochfort* (1880), 16 Ch. D. 18). Where, however, the appointment is direct to the intended beneficiaries, the application of the rule is sometimes a matter of difficulty.

Two cases may be cited to illustrate the application.

In *Coxen v. Rowland*, [1894] 1 Ch. 406, a testatrix gave, devised, and bequeathed all the real and personal estate and effects whatsoever and wheresoever which she might be possessed of or entitled to, or which by virtue of any power or authority by any deed or will, or of any separate use or right of property, she was competent to dispose of in manner following. She then made several

Illustrations  
as to lapsed  
appoint-  
ments.

**Art. 27.**

Para. (1).

specific bequests and devises, and continued : “ I give and devise my messuage and premises formerly known as No. 18, but now known as No. 35, Stokes Croft, Bristol, to my husband absolutely ” : and there was a residuary bequest in favour of her husband. The premises, No. 35, Stokes Croft, were not the property of the testatrix, but she had a general power of appointment over them. Her husband predeceased her. It was held that the testatrix had taken the property out of the instrument creating the power for all purposes. “ It appears that throughout the will she draws no distinction between property which belonged to her, and property over which she had only a power of disposition : all such property is alike spoken of as belonging to the testatrix. If the final residuary gift had been in favour of some person other than her husband, the house, No. 35, Stokes Croft, would, as it seems to me, have passed under it ” (*per* STIRLING, J., at p. 412).

In *Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232, the testatrix, who had a general power to appoint by her will a fund of £5,000, after reciting the power of appointment, proceeded, “ Now in exercise of such power I give and bequeath the said sum of £5,000 and also all the residue of my real and personal estate and effects not otherwise disposed of by me, equally between and amongst my several nephews and nieces following ”—then came the names of eight nephews and nieces—“ as tenants in common.” The will contained no direction to pay debts. By a codicil she gave each of her nephews and nieces legacies “ out of my own moneys,” and directed the legacy duty to be paid out of her general residue. By a subsequent codicil she revoked one of these legacies, and gave other legacies “ out of her own moneys.” Two of the appointees of the £5,000 predeceased her :—*Held*, that the power was not so exercised as to take the shares of these two out of the instrument creating the power, so as to

make it part of her residuary estate. ROMER, J., at p. 235, said: "The testatrix has herself drawn a distinction between the £5,000 and her own property. She has given certain legacies by her codicils, expressly payable out of 'her own moneys' by which I understand her to mean that in no case was the £5,000 (which was not her own) to aid in case of deficiency of her own property in paying those legacies, and she does not anywhere treat or describe the £5,000 as part of her own residue or as her own money."

**Art. 27.**

Para. (1).

#### PARAGRAPH (2).

Both parts of this rule may be well illustrated by Illustrations. *Mason v. Ogden*, [1903] A.C. 1. There a testator having devised a freehold property at W. to his son, left to the plaintiffs "all other my freehold messuages and tenements at W. and elsewhere." The son having attested the will the devise to him lapsed. At his death the testator had no copyhold estates. KEKEWICH, J. (*In re Mason, Ogden v. Mason*, [1900] 2 Ch. 196), felt compelled, on the authority of *Springett v. Jennings* (1871), 6 Ch. 333, to hold that the devise not being large enough to include all real estate was not a good residuary devise. On appeal the Court of Appeal ([1901] 1 Ch. 619) held (1) that "all other my freehold messuages" did not limit the devise to these freeholds which the testator had not before mentioned; and (2) that it was not necessary that a devise to be residuary should be capable of including all sorts of real estate. The House of Lords affirmed this decision. Lord DAVEY said (at p. 47): "The real question is whether that gift of 'all other' the testator's freehold messuages and so forth is a residuary gift. One asks oneself, Why not? The gift is precisely the same (that is not disputed) as if he had said, 'And as to the residue of my freehold messuages and tenements at Wimbledon and elsewhere.' In form it certainly is a residuary gift. Why is it not to

**Art. 27.**

Para. (2).

be treated as a residuary gift under s. 25? Well, my lords, the only legal reason I have heard is that it does not possess the attribute of 'universality,' whatever may be meant by that; and the judgment of MELLISH, L.J., in *Springett v. Jennings* is referred to in support of that proposition. All that I understand that very learned judge to have meant by his expression . . . was that a clause which is relied on as a residuary clause must be so framed as to sweep in by its terms the whole of the property to which it applies. When you are speaking of a residuary gift of personal estate, the clause must be so framed as to be capable of carrying every description of personal estate not otherwise disposed of by the will; and when you are speaking of a residuary gift of real estate generally, it must be so framed as to carry in every atom of real estate; but why we may not have a residuary gift of freehold estate I am at a loss to understand."

The difficulty seems to be that s. 25 enacts that *any* devise which fails is to fall into the residuary devise. That seems, undoubtedly, to assume that a residuary devise must be capable of including *any* devise. Residuary devises of freeholds merely would in that case not come within the Act, since lapsed devises of copyholds could not be included within them.

## PARAGRAPH (3).

Contrary  
intention.

Lapsed shares of residue do not fall into the residue unless a contrary intention appears (*Skeggs v. Northcote* (1818), 1 Sw. 566). Formerly the court went further than this, and held that even where the will contained an express direction that a lapsed share should fall into the residue, it, nevertheless, did not do so, but was undisposed of by the will (*Humble v. Shore* (1847), 7 Hare 247). This decision, which was very reluctantly acquiesced in, has now been expressly overruled by the

Court of Appeal in *In re Palmer, Palmer v. Answorth*, [1893] 3 Ch. 369. And in *In re Allan, Dow v. Cassaigne*, [1903] 1 Ch. 276, this principle has been carried further since it was there held that where it is clear that the intention of the testator was to treat the whole residue as an integral fund, then not merely will the original, but also the accrued, shares fall back into the residue. And in *In re Parker, Stephenson v. Parker*, [1901] 1 Ch. 408, FARWELL, J., held that where there is a gift over on the complete failure of the original objects to which the residue was left, that is enough to indicate an intention on the testator's part that on the partial failure of such objects their shares of the residue are to accrue to the remaining objects. Indeed, he expressed a doubt whether since the decision of *In re Palmer, Palmer v. Answorth, supra*, the doctrine of *Skrzynsher v. Northcote, supra*, can be maintained at all.

**Art. 27.**

Para. (3).

The same rule applies when a testator gives a share of his residuary estate to a person and by a subsequent will revokes the gift without adding any further words of disposition. Here the court will hold that the share is undisposed of (*per* BUCKLEY, J., in *In re Radcliffe, Young v. Beale* (1903), 51 W. R. 409, at p. 410. But in the same way where the testator shows any intention that the revoked share should fall into the residue and go to the persons to whom the remainder of the residue was left, the rule will not apply. Thus, in *In re Radcliffe, Young v. Beale, supra*, a testatrix left her residuary estate to four named persons, A., B., C. and D., "as tenants in common and if only one of them shall survive me then to such one absolutely." By a codicil she revoked the gift to D., but made no new disposition of it: *Held*, that the gift over of lapsed shares to the sole survivor if only one of the legatees survived was a sufficient indication to show that the revocation was to be read simply as a removal of D.'s name from among the persons who were to share in the residue.

## Art. 27.

## PARAGRAPH (4).

Two  
residuary  
clauses.

This is the rule as established in *In re Isaac, Harrison v. Isaac*, [1905] 1 Ch. 427. There a testator by his will appointed H. his executor, then gave pecuniary legacies to sixteen persons, including H., bequeathed his watch to his nephew, and then directed that “the remainder of” his “property” should “pass as follows viz. to be divided amongst” certain named persons in defined shares. The will concluded as follows: “And I appoint my executor my residuary legatee.” Two of the pecuniary legacies lapsed by the death of the legatees in the testator’s lifetime: *Held*, that they were part of “the remainder” of his “property” and passed to the first residuary legatees and not to “my residuary legatee.”

In his judgment, BUCKLEY, J., said: “If the will had not contained these last words appointing the executor residuary legatee it seems to me that the words ‘the remainder of my property shall pass,’ etc., would have constituted a perfectly good residuary bequest. But the will does contain the words I have mentioned. Does that fact alter the construction which I have placed on the first residuary gift? I do not think it does, unless the effect be to reduce the earlier words to silence. Is it possible, without doing this, to give a proper effect to the later words? In my judgment it is, because if the prior gift of one or more of the shares of ‘the remainder’ were to fail, owing to a lapse by the death of the legatee in the lifetime of the testator, the subsequent disposition appointing a residuary legatee would take effect. If some person entitled to a share of the remainder died in the lifetime of the testator there would be a lapse of a part of the first-disposed-of residue, and under the second disposition the residuary legatee would take something.”

*Johns v. Wilson*, [1905] 1 I. R. 342, which was not cited in *In re Isaac, supra*, agrees with that case, save

that the court seemed to think that the effect was to give the second residuary gift nothing to operate upon.

**Art. 27.**

Para. (4).

It may be respectfully suggested that in both these cases the testator meant what he said. *Primâ facie* remainder of "property" means the testator's property less the preceding gifts. To prevent intestacy the court, unless a contrary intention appears, reads it as a residuary gift in the technical sense—that is, one carrying with it all the preceding gifts which do not take effect. But if the testator appoints a residuary legatee—that is, a person to take gifts which fail—surely this might reasonably be held to indicate his intention that by giving the remainder of his property he means a gift of the remainder of his property and not a residuary bequest?

Observations  
on *In re*  
*Isaac*.

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**ART. 28.** —When "*Estate*" will include both *Real and Personal Estate*.

(1) *Primâ facie*, a general gift of the residue of the testator's "estate," without more, will include his real as well as his personal estate. But if other words are used in addition to "estate" then

- (a) if such other words are not in themselves sufficient to include all the personal estate, the word *estate* will be restricted to personal estate;
- (b) but if the other words are in themselves sufficient to include all the personal estate then the word *estate* will be extended to real estate, for otherwise it would be meaningless.

(2) When the words used are sufficient to include in the gift both the real and personal estate of the testator,

- Art. 28.** the fact that the trusts declared of the property included in the gift are trusts only applicable to personal estate will not be enough to show that the real estate was not intended to be included or to give rise to a resulting trust of the real estate.

#### PARAGRAPH (1).

**Authorities**      “The general principles applicable to cases of this sort are well established. The difficulty is not in ascertaining the principles, but in their application. One rule is that the word *estate* simply is sufficient to pass *real estate*; but in most cases the word *estate* is not used simply; and another rule is, that supposing there is nothing in other parts of the will to control the meaning of the gift, the effect of the word *estate*, coupled with other words, is this: If the other words would, without the word *estate*, not be sufficient to pass the whole personal estate, the word *estate* will be considered as used to effect a complete passing of the *personal estate*; but if the other words are sufficient to pass *all* the personal estate then the word *estate* must be read as intended to apply to real estate” (*per* KINDERSLEY, V.-C., in *D’Almaine v. Moseley* (1853), 1 Drew. 629, at p. 632).

**Illustrations.** In *D’Almaine v. Moseley*, *supra*, a testator left all the residue of his “estate and effects” to A., B., and C., upon trust to collect, get in, and recover the same, and invest in stock and pay the interest and dividends to his wife for life, and from and after her death to divide the residue among his children:—*Held*, that the real as well as the personal estate passed. “The rule being,” as KINDERSLEY, V.-C., explained (at p. 632), “that the word *estate* is sufficient to pass real estate, and the other words used in this case being *effects* (which is sufficient to pass all the personal estate, so far as the language is concerned), *primâ facie*, the word *estate* here would comprise the *real estate*;

and unless there is something in the will to show a clear indication of intention to use the word *estate* in a sense different from its ordinary legal sense, it must be read in that sense . . . The tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times."

**Art. 28.**

Para. (1).

#### PARAGRAPH (2).

"The circumstance of his using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that this fee would be part of his residue ; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property" (*per* Lord COTTENHAM, L.C., in *Saumarez v. Saumarez* (1839), 4 My. & Cr. 331, at p. 340).

The case of *D'Almeida v. Moseley*, *supra*, is an illustration of this paragraph ; but *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483, may be considered the leading case upon it, since in his judgment BUCKLEY, J., discusses nearly all the decisions upon both parts of the above article.

There the testator made this gift : "As to all my ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, I give and bequeath the same and every part thereof to the said K. and S."—whom he had already appointed his executors—"their executors, administrators and assigns," upon trusts which related to the income, described as "income" or "interest, dividends and annual proceeds" (in some places "produce"), and to *corpus* described sometimes as "the said trust moneys, stocks, funds and securities," and in other places as "the said

**Art. 28.** trust moneys." He also empowered the trustees to vary the securities. It was argued first that the words were not sufficient to pass the testator's real estate, and secondly, that if they were, the trusts declared being inapplicable to real estate, there was a resulting trust as to it. BUCKLEY, J., first laid down the principles to be applied to the interpretation of the will in this way : " First, I ought to read the whole of the will, and from it ascertain the testator's intention : secondly, in ascertaining the intention I ought to a certain extent—we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate, if, on a fair construction, there is reason for saying the contrary. Thirdly, where the testator uses technical words, I must give them their due effect, unless I find that in the mouth of the testator they have some other meaning. Fourthly, I must apply any established rule of construction which has been adopted by the court." Then he held (applying these principles) that, firstly, the words were sufficient to pass both real and personal estate, and that, secondly, the trusts declared did not raise a resulting trust of the real estate in favour of the heir-at-law.

**ART. 29.** — "*Land*" includes *Freeholds, Copyholds, and Leaseholds.*

A gift, in a will, of property described merely as "land," or in any other general manner which would be sufficient to describe a copyhold or leasehold estate if the testator had no freehold estate which could be described by it, will include any copyhold and leasehold as well as freehold estates described by it, unless a contrary intention shall appear by the will itself.

"A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person

mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will" (7 Will. 4 & 1 Vict. c. 26, s. 26).

Art. 29.

"Before the passing of 7 Will. 4 & 1 Vict. c. 26 the leaseholds would not pass under such a devise as this, unless the will showed elsewhere a clear intention that they should do so : but since the Act a contrary intention must be positively shown, in order to prevent them from so passing" (*per* Lord CAMPBELL, in *Wilson v. Eden* (1852), 18 Q. B. (N.S.) 474, at p. 487).

"The object of that section was to abrogate a merely technical rule, tending in many cases to defeat the intention of testators naturally using language, and not to establish, instead of that technical rule, another technical rule, which in particular cases might have a like effect in the contrary direction. The intention is to be regarded, and really all the clause does which is material for present purposes, is in conformity with what I should say was rightly considered by the legislature to be the natural *prima facie* use of language, to alter the *onus probandi* and to throw it on persons who deny that in a will 'land' was meant to include leasehold estates in land" (*per* Lord SELBORNE, C., in *Prescott v. Barker* (1874), 30 L. T. 149).

"The statute says that 'leaseholds' are to pass 'unless a contrary intention shall appear by the will.' What is the meaning of that ? It must be that the court, having the construction of the will to determine, must be satisfied, by regarding every part of it, that the testator did not

**Art. 29.** intend under a general devise of lands and hereditaments to pass the leasehold property " (*per* MALINS, V.-C., in *Prescott v. Barker* (1874), 29 L. T. 727, at 730).

Does s. 26  
apply to "real  
estate"?

The only term specifically referred to in s. 26 is "land," but there is added "and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate." This phrase has given rise to some uncertainty whether or not such words as "real estate" or others descriptive properly of freeholds only are within the section. Before the Wills Act the words "real estate at A." would carry not merely the freeholds but also the leaseholds which were mixed up in situation with them (*Hobson v. Blackburn* (1833), 1 My. & K. 571), and of course that remains so now (*In re Uttermare*, *Leeson v. Foulis*, W. N. (1893), 158; *In re Guyton and Rosenberg's Contract*, [1901] 2 Ch. 591). But it is not clear that, before the Wills Act, a general devise of real estate not locally identified, would carry leaseholds when the testator had no freeholds. When, however, the real estate was identified as "my real estate at A." that would carry leaseholds there if the testator had no freeholds (*Swift v. Swift* (1859), 1 De G. F. & J. 160). The effect of s. 26 of the Wills Act seems to be that in the latter case—*i.e.*, where the estate is locally identified—the words "real estate" will carry both the freeholds and leaseholds there (*Moose v. White* (1876), 3 Ch. D. 763), but in the former case—*i.e.*, where there is no local identification they will carry merely the freeholds as before the Act (*Butler v. Butler* (1884), 28 Ch. D. 66). It is sometimes thought that *Wilson v. Eden* (1852), 18 Q. B. (N.S.) 487, carries the section further than this, but as is pointed out by CHITTY, J., in *Butler v. Butler* (at p. 73), the point there, was not what was the meaning of real estate under s. 26, but whether the words "other real estate" should be taken as qualifying "all my lands at W." Lord LANGDALE was at first inclined to think they did,

and that only freehold land at W. passed. But the Court of Queen's Bench held that "all my lands at W." were to be read separately, and so read they are clearly within s. 26. Art. 29.

The section is to apply only when no contrary intention appears by the will. It has been held in *Wilson v. Eden*, *supra*, that the fact that the limitations of the lands devised can legally apply in full, only to pure realty, is not in itself sufficient evidence of an intention that the leaseholds should not pass along with the freeholds under the devise. But that fact is a circumstance to be taken into consideration in seeking the testator's intention, and when combined with other things—such, for instance, as the personalty being settled on limitations to attend the realty—may prove sufficient to convince the court that the testator meant by "land" merely freehold land (*per* Lord SELBORNE, in *Prescott v. Barker* (1874), 30 L. T. 150).

As an instance of what the court will think sufficient evidence that the testator did not intend the word "lands" to carry the leaseholds, the case of *Prescott v. Barker*, *supra*, may be cited. There the testator devised all his "messuages lands and hereditaments in the county of M., and all other lands and hereditaments in England belonging to him," to his eldest son for life, and afterwards to his issue in tail male. He bequeathed "all his money securities for money goods chattels and personal estate" to trustees upon trusts corresponding to the trusts of the land, but subject to a proviso that they "should not vest absolutely in any person thereby made tenant in tail by purchase, unless such person should attain twenty-one." A power of sale was given to the trustees over the land devised, with a direction that the proceeds might be invested in freeholds or leaseholds "convenient to be held therewith," which were to be settled on trusts similar to those set out above as to land and personalty respectively.

Contrary  
intention  
appearing by  
the will.

Illustration  
of contrary  
intention.

- Art. 29.** Some heirlooms were settled in strict settlement. The testator owned both freeholds and leaseholds in the county of M. :—*Held*, that the leaseholds did not pass under the devise of messuages, lands and hereditaments, but under the bequest of personalty, and that consequently they did not vest absolutely in the first tenant in tail who was an infant.
-

## PART IV.

### INTERESTS TRANSFERRED.

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## CHAPTER I.

### GIFTS GENERALLY.

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#### ART. 30.—*Absolute Gifts.*

Where in a document words of gift are used which by themselves are sufficient to give the donee the whole property in the subject matter of the gift, the donee's interest—

- (1) will not be cut down to a trust estate merely because by subsequent words the donor
  - (a) expresses a wish, hope, confidence or recommendation that the donee shall use the

**Art. 30.**

gift in a certain way or explains his motive for making the gift ;

(b) imposes as a condition of the gift that the legatee shall do something involving expense.

(2) Will not be cut down to a life estate by a subsequent

(a) direction that any part of the gift which the donee does not dispose of in his lifetime shall go on his death to certain objects ;

(b) gift over on certain contingencies, which fails or is void.

## PARAGRAPH (1) (a).

## Authorities.

“ Where there are words, prior to the words of request, which if they stood alone, would give well-known legal or equitable rights, and afterwards there come words of request, it appears to me that the strongest possible circumstances would be required to enable the court to say that those words of request are to cut down the prior words giving the legal or equitable rights, and impose an obligation” ( *per* Lord ESHER, M.R., in *Hill v. Hill*, [1897] 1 Q. B. 483, at p. 487).

“ Undoubtedly, confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe ; and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her” ( *per* COTTON, L.J., in *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394, at p. 410).

The first part of this paragraph deals with what are called precatory trusts. The rule as to these has during the past forty years altogether changed its current. As laid down in such cases as *Malim v. Keighley* (1794), 2 Ves. 333, and *Knight v. Knight*, 3 Beav. 173, the rule of construction might shortly be stated thus: If a gift *prima facie* absolute, is accompanied by a desire, wish, recommendation, or hope that the donee shall use it in a certain way, a precatory trust attaches to it unless a contrary intention can be shown. The rule as laid down in such cases as *Hill v. Hill*, *supra*, and *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370, might, with tolerable accuracy, be stated in precisely the opposite terms, namely: If a gift *prima facie* absolute is accomplished by a desire, wish, recommendation, or hope that the donee shall use it in a certain way, a precatory trust shall not attach to it unless a contrary intention can be shown. In other words, the burden of proof is now, in spite of the use by the donor of such words, on the side of the person who alleges the trust. These words are to be taken into consideration to some extent in deciding whether or not there is a trust, but unless they are helped by the context, no trust will attach. "There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation, and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation. . . . But still in each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist; yet, moreover, in some of the older cases obligations were inferred

Art. 30.

Para. (1) (a).  
Precatory trusts.

**Art. 30.** from language which in modern times would be thought insufficient to justify such an inference" (*per* LINDLEY, L.J., in *In re Williams, Williams v. Williams*, [1897] 2 Ch. 12, at p. 18). "As is stated in the head note to *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370, the rule you have to observe is simply this: 'In considering whether a precatory trust attaches to any legacy, the court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.' . . . That rule is a sensible one" (*per* ROMER, J., *ibid.*, at p. 14).

**Illustrations.** Thus, in *In re Hamilton, Trench v. Hamilton, supra*, a testatrix gave legacies to two nieces, adding: "I wish them to bequeath the same equally between the families of O. and P."—*Held*, that the gifts to the nieces were absolute, and that there was no precatory trust in favour of the families of O. and P.

In *In re Williams, Williams v. Williams*, [1897] 2 Ch. 12, a testator gave all his residuary estate to his wife, her heirs, executors, and administrators and assigns absolutely, "in the fullest trust and confidence that she will carry out my wishes in the following particulars"; which particulars were, that she should pay the premiums on her life policy (which belonged to her, not to the testator), and on her death leave the money payable on this policy and also that payable on the testator's policy—which was part of his estate—to their daughter L.:—*Held*, that there was no precatory trust.

Again, in *In re Oldfield, Oldfield v. Oldfield*, [1904] 1 Ch. 549, a testatrix gave all her property equally amongst her two daughters "as tenants in common for their absolute use and benefit" and appointed them her executrices. She then added, "My desire is that each of my said daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments

under my will":—*Held*, that no trust was created in favour of the son. And STIRLING, L.J., cited with approval the passage above quoted from the judgment of LINDLEY, L.J., in *In re Williams, Williams v. Williams, supra*. Art. 30.  
Para. (1) (a)

Again in *In re Harbison, Morris v. Larken*, [1902] 1 I. R. 103, a testatrix by her will provided as follows: "I give and bequeath my dwelling-house . . . to Rev. T. L. parish priest for a Roman Catholic school, or for whatever other purpose he pleases": *Held*, that T. L. took not as a trustee but beneficially.

Most cases of precatory trusts arise in connection with wills, but occasionally they arise in connection with other documents, when the same rule of construction applies. Thus, in *Hill v. Hill*, [1897] 1 Q. B. 483, certain family diamonds were given on her marriage to the bride of the heir presumptive to the Viscounty of Hill. The terms upon which they were given were thus stated in a document deposited with them by the lady: "When I married my mother-in-law gave them to me for my life with the request that at my death they might be left as heirlooms": —*Held*, that this created no precatory trust.

As an example of a mere expression of confidence being by the context turned into a declaration of trust binding upon the donee, the case of *Comiskey v. Bouring-Hanbury*, [1905] A. C. 84, may be cited. There a testator gave, devised and bequeathed to his wife "the whole of my real and personal estate and property absolutely in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." The testator then made his wife and C. F. executrix and executor of his will, and added, "And I give the said Expression  
of confidence  
made binding  
by context

**Art. 30.** C. F. such sum not exceeding £150 as my dear wife may decide upon.” KEKEWICH, J., and the Court of Appeal (COZENS-HARDY, L.J., dissenting), in *In re Hanbury, Hanbury v. Fisher*, [1904] 1 Ch. 415, held that no trust was here imposed on the wife, but that she took absolutely, the direction that if she did not dispose of the property by her will it should go to the testator’s nieces equally being void for repugnancy. See *infra*, p. 176. The House of Lords, however, held (Lord LINDLEY dissenting) that there was a trust binding on the wife in favour of the nieces. She took an absolute estate if she outlived the nieces. If she did not, she had power to appoint by her will the property as she liked among them : but if she did not so appoint it, it was to go among them equally. See *supra*, p. 95. Lord DAVEY said (at p. 90): “Even if you treat the words ‘in confidence’ as expressing a hope or belief, the will would run thus : ‘I hope and believe that she will give the estate to one or more of my nieces, but if she does not do so, then I direct that it shall be equally divided between them.’ I think this is a perfectly good limitation. The true antithesis, I think, is between the ‘such one or more of my nieces as she may think fit’ and the words ‘equally divided between my surviving said nieces.’”

#### PARAGRAPH (1) (b).

**Authorities.** “If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of those two modes admits just of this difference : The former is a devise of an estate of inheritance for the purpose of giving the devisee a beneficial interest subject to a particular purpose ; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is

given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir" (*per* Lord ELDON, C., in *King v. Denison* (1813), 1 V. & B. 260). Art. 30.  
Para. (1) (b).

Thus, in *Croome v. Croome* (1889), 59 L. T. 583 ; Illustrations. 61 L. T. 814, a testator made his will as follows: "I give and bequeath to my brother E. whatsoever real estate I may die possessed of wheresoever situate, on trust nevertheless to pay thereout" certain debts discharged in full during the testator's life, "and also in trust to pay to each of my sisters M. and C. and to my brother A. as long as they live respectively the sum of £50 every year by two equal half-yearly payments": *Held*, that E. took beneficially subject to the annuities. And *cf.* *In re West, George v. Grose*, [1900] 1 Ch. 84, where it was held that after discharging the trusts there was a resulting trust of the residue.

#### PARAGRAPH (2).

The question arising under the second paragraph, namely, the reduction of what is *prima facie* an absolute interest to a life estate, is governed by practically the same principle as applies in the case of precatory trusts. There must be a clear intention to cut down the absolute interest, and the mere fact that the donor attempts to dispose, at the death of the donee, of what the donee may not have parted with during his life, or that he makes a gift over on contingencies which fails or is void, is not a sufficient expression of such intention.

#### PARAGRAPH (2) (a).

"It is clear that if a gift is made in terms to a person Repugnant absolutely, that can only be reduced to a more limited conditions. interest by clear words cutting down the first estate" (*per* BYRNE, J., in *Re Jones, Richards v. Jones*, [1898] 1 Ch. 438, at p. 441).

**Art 30.** “It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has, as an incident of his ownership, the right to sell, and to receive the whole of the proceeds for his own benefit. But this testator says, that if the owner sells, a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void. My opinion is based on the broad general principle of law” (*per* CHITTY, J., in *In Re Elliot, Kelly v. Elliot*, [1896] 2 Ch. 353, at p. 356).

**Illustrations.** Thus, in *Re Jones, Richards v. Jones*, [1898] 1 Ch. 438, a testator gave all his property subject to the payment of his debts, to his wife “for her absolute use and benefit so that during her lifetime, for the purpose of her maintenance and support, she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife’s funeral expenses I give . . . the same” on various trusts:—*Held*, that the gift to the widow was absolute, and that the gift over on her death was void (*cf.* *Re Elliot, Kelly v. Elliot*, [1896] 2 Ch. 353; and *In re Richards, Uglow v. Richards*, [1902] 1 Ch. 76, *infra*).

In the same way in *In re Dixon, Dixon v. Charlesworth*, [1903] 2 Ch. 458, a testator left property in trust for his daughters with a direction that if they married and had children each daughter’s share should go to her children, but in case a daughter died “childless and without a will,” her share was to fall into the testator’s residuary estate:—*Held*, that the last provision was repugnant to the absolute gift and void (*Cf.* *Re Rowland, Jones v. Rowland* (1902), 86 L. T. 78. And see *In re Restell* (1901), 17 T. L. R. 395.)

Gift over  
sometimes  
good.

In this connection it may, perhaps, be pointed out that in a bequest, such as that in *Re Jones, Richards v. Jones*,

*supra*, if the wife had predeceased the testator the gift over on trust would be good. Practically what was here attempted to be done was to limit an interest over, after giving an absolute interest. Where such limitations occur in wills, the limitation over fails only when the preceding interest takes effect (*In re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348).

**Art. 30.**

Para. (2) (a).

Sometimes it is difficult to determine whether the donee was intended to take an absolute estate subject to a repugnant condition, or a life estate with a general power of appointment, which, of course, is a perfectly valid limitation. Thus, in *In re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939, a testator by his will left his real estate to his two sons in strict settlement, and certain personal estate absolutely. By a codicil he revoked his will, and gave all his property to his wife, "so that she may have full possession of it and entire power and control over it to deal with it or act with regard to it as she may think proper." In the event of her not surviving him, or dying "without having devised or appointed" the whole or any part of his said property, then he declared that his said will should take effect as if his codicil had not been made; and he appointed his wife executrix of his codicil during her life. The wife survived the testator:—*Held*, that she took only a life estate with a general power of appointment, and as she had failed at her death to make an effectual appointment of the testator's estate, it passed under the testator's will to his two sons. And *cf.* *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84 (*supra*, p. 173).

Not infrequently a gift of the income of a fund is made for the life of the donee with a power to draw upon the *corpus* under certain circumstances. Here, of course, a gift over, after the life estate, of what is then left, is perfectly valid, but questions may arise as to the extent of the power. Thus, in *Re Pedretti's Will* (1859), 27 Beav. 583, where, after a gift of income for life, there

Gift of income with power to draw on capital.

**Art. 30.** was a direction that in case the income was "not sufficient" the donee might resort to the principal, the court held that the donee was entitled to take from the principal only what was necessary for her wants. In *In re Richards, Uglow v. Richards*, [1902] 1 Ch. 76, on the other hand, where the direction was that the life tenant in case the income was insufficient might take as much capital "as she may deem expedient," it was held that the life tenant had a general power of appointment over the whole *corpus* during her life, but it was doubted whether she could exercise such power by her will. And see *Re Colyer, Millikin v. Snelling* (1886), 55 L. T. 344.

The fact that the *corpus* is given "absolutely" to a legatee is not sufficient to prevent the court cutting down the bequest to a life estate, if, on reading the whole will, it is clear the testator intended to give a life interest only. Thus, in *In the Estate of Lupton*, [1905] P. 321, a testator by his will, which was drawn on a printed form, purported to give all his property to his wife "for her own absolute use and benefit . . . subject only to the payment of" debts and funeral and testamentary expenses, the wife being appointed sole executrix . . . "and after her death to come to" H. "to her and her heirs for ever" after payment of £20 to two sisters of H.:—*Held*, that the widow took merely a life interest with remainder absolutely to H.

#### PARAGRAPH (2) (b).

"In my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on the absolute interest which fail, either for lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be" (*per* Lord DAVEY, in *Hancock v. Watson*, [1902] A. C. 14, at p. 22).

This question will be found treated in detail, *infra*, at pp. 293 *et seq.*

Art. 31.  
—ART. 31.—*Express Gifts, and Gifts by Implication.*

(1) In a deed, no estate or interest can pass except under express words of grant. But—

(a) A greater estate or interest may pass than that described in the express words of the deed, if, from the general purport and nature of the deed, it was the clear intention of the donor to pass that greater estate or interest; and

(b) i. When property is given among a number of donees with no express cross remainders or clause of survivorship between them, such remainders or clause will not be implied;

(b) ii. And where cross remainders or a clause of survivorship are expressly given, such remainder or clause will carry a donee's original but not his accrued share of the property; unless the deed clearly indicates that the donor intended the gift over not to take effect till all the interests originally limited in the property had failed.

(2) The same rule applies to gifts by will, subject to this exception: If, upon the death of a certain person, realty be devised to the testator's heir at law, or personalty be bequeathed to the testator's next of kin according to the statute, and no disposition of the property during such person's life is made, an estate or interest for life in the property will be held by necessary implication to pass to such person.

\* I might be perfectly satisfied that he intended that Authorities. this lady should have an estate of inheritance in this

**Art. 31.** — property. I might be satisfied that that was his intention otherwise than by the words of the will ; but I should be compelled to come to the same conclusion as I do now, namely, that that intention is not sufficiently expressed. It is manifest that, taking either alternative proposition put forward by the appellants, this House, if it is called upon to give that effect to the instrument, must put words into the will in order to do it. The thing has not been done ; and I am not aware of any authority which would lead your lordships to come to the conclusion that, because the testator had, at some time or other, the intention in his mind to give this property to the person in question, you are justified in saying that he has done so by the instrument which he has executed ” (*per* Lord HALSBURY, L.C., in *Scalé v. Rawlins*, [1892] A. C. 342, at p. 343).

“ By the rules of the common law applicable to deeds, no intention will be presumed unless it be expressed ; and consequently no estate will arise unless there be a limitation to pass the estate ” (1 Prest. Est. 190).

“ Where a man devises real estate after the death of A. to his, the testator’s, heirs, it is said that the heir is not to take until after the death of A. ; and the result cannot be arrived at without giving A. a life estate, otherwise the heir would take immediately, which, presumably, is not intended. . . . What is the presumed intention of a gift of personal estate to the testator’s next of kin, according to the statute, after the death of A. ? It is this : ‘ I do not intend my personal estate to go, immediately on my death, to the persons entitled to it by law, that is, according to the Statute of Distributions.’ If, therefore, you find that those persons are only to take after the death of A., then it may be impossible to give effect to that intention except by implying a gift of a life estate to that person after whose death the next of kin are to take according to the terms of the will ” (*per* KEKEWICH, J., in *Re Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603, at p. 606).

It is to be understood that the rule stated in the article **Art. 31.** as to grants has no reference to resulting trusts or uses, but applies solely to grants in the ordinary sense of transferring an interest.

### PARAGRAPH (1).

It is submitted that, subject to the exception stated in the second paragraph, the rule as to gifts by implication is precisely the same in the case of wills and deeds respectively. In both cases the intention to make the gift must be expressed before any estate or interest whatever can pass. Once the intention is expressed, the extent of the estate or interest which passes may be modified by an intention gathered from other parts of the instrument, or from the general purport of the instrument. See *Williams v. Pinckney* (1898), 77 L. T. 700. Same rule applicable to wills and deeds.

The differences which arise in the application of this rule to wills and deeds are due primarily to this fact—that while in wills all estates and interests in land may pass without technical words of limitation, this is not the case in deeds, at least when the legal estate in land is dealt with. See *infra*, p. 183; and *per* POLLOCK, C.B., in *Doe d. Clift v. Birkhead* (1849), 4 Ex. 110, at p. 125. This circumstance makes it much easier in the case of a will than in the case of a deed to infer an intention to pass a certain estate, and easier more especially to expand what *prima facie* is a smaller estate into a larger one. Besides this circumstance there is, of course, the further one that wills, and more especially technical terms in wills, are construed very liberally. But as stated by Lord HALSBURY, C., in the passage cited p. 179 from his judgment in *Scale v. Rawlins*, where there is no gift actually made by the instrument, no presumption that a gift was intended to be made will be sufficient to create a gift. In that case a testator left freehold property in trust to pay the rents and interest to his niece for life, and after her decease,

- Art. 31.** “she leaving no child or children,” he gave the houses one to S. and two to W. The niece survived the testator, and died leaving two children :—*Held*, that the niece took merely a life estate and the children no interest under the devise.
- Para. (1).**

#### PARAGRAPH (1) (a).

Examples of  
enlarging  
estates.

As an example of an estate granted under a deed being enlarged beyond the literal terms of the grant, by an intention collected from the whole instrument, *Re Akeroyd's Settlement*, *Roberts v. Akeroyd*, [1893] 3 Ch. 363, may be cited. There, in a marriage settlement, a life estate was limited to the wife, and after her death to the husband, until he should become bankrupt or alienate the same, or until his death, whichever should first happen. Then followed a gift over to the children on the death of the survivor of the husband and wife :—*Held*, that this must be read as a gift over on the death of the survivor or on the bankruptcy of or alienation by the husband. In delivering judgment, LINDLEY, L.J., says : “The intention is plain, but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention, because in the gift over he has confined it to one of the events instead of putting in some general words which would cover the whole ; but that particular kind of flaw does not require a suit to rectify the instrument. This mistake can be corrected by construction, provided the intention is clear and plain from the document itself.” And see *In re Shuckburgh's Settlement*, *Robertson v. Shuckburgh*, [1901] 2 Ch. 794, and *cf.* *Blackwell v. Ball* (1836), 1 Keen, 176 ; *Allin v. Crawshay* (1851), 9 Hare, 382. Of course, when the intention is not clear and plain, the instrument, until rectified, must have its literal effect (*In re Tredwell*, *Jeffray v. Tredwell*, [1891] 2 Ch. 640).

The principle of the decision in *Re Akeroyd's Settlement*, *Roberts v. Akeroyd*, *supra*, is very like the rule long

established with respect to wills, namely, "that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the determination of that estate by death" (*Browne v. Hammond* (1858), 1 John. 210; *Underhill v. Roden* (1876), 2 Ch. D. 494). **Art. 31.**  
Para. (1)(a).

The rule that technical words of limitation are necessary to pass a fee in realty does not apply to the equitable estate. See *infra*, pp. 197, 203. Accordingly we find equitable estates, which *prima facie* are only life estates, being extended by necessary implication into fees simple. Thus, in *In re Triingham's Trusts*, *Triingham v. Greenhill*, [1904] 2 Ch. 487, copyholds were surrendered in fee simple to trustees to hold in trust for M. for life, and after her death for her husband for life, and after the death of the survivor in trust for the children of the marriage as tenants in common, and, in default of issue, then to such uses as M. should declare by her will, with remainder to the right heirs of M. :—*Held*, that the children of M. took not life estates but the fee simple. And see *In re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191; and *cf.* *In re Harrison's Estate* (1870), 5 Ch. App. 408, where the settlement was by will and the legal estate was dealt with.

In these cases it may be said that there was no extension of the estate properly speaking, since the estate to be taken by the donee was not expressly set out; but it is still the rule that where an equitable freehold is conveyed to a grantee without words of limitation *prima facie* only a life estate passes (*In re Irwin*, *Irwin v. Parkes* [1904] 2 Ch. 752). Moreover, there is no reason to think that if, for instance, the trust in *Cropton v. Davies* (1869), 4 C. P. 459, had arisen under a deed, and not under a will, the construction of the limitation of the equitable estate would have been different. In that case a testator devised three freehold houses to trustees in trust, as to the first two (subject to a life interest to his widow) "to

**Art. 31.** convey and assign " the first " to his daughter E., her heirs and assigns for ever " ; as to the second, in similar terms to his daughter C. ; and as to the third, " upon trust to apply the rents for the advancement and benefit of my granddaughter M. until she attains the age of 21 years ; but in case my said granddaughter should die under age, then I devise the said dwelling-house to my daughters E. and C., their heirs and assigns, as tenants in common " :—*Held*, that M. took a fee simple in the dwelling-house subject to defeasance in the event of her dying under twenty-one.

Para. (1)(a).

Here the implied gift of the fee simple was helped by the gift over, which could not take effect unless M. died before attaining twenty-one. Where there is no gift over it is more difficult to imply an absolute gift in such a case. See *In re Hedley's Trusts* (1877), 25 W. R. 529.

#### PARAGRAPH (1) (b) i.

Principle.

" I think the true rule is laid down in the old case of *Doe v. Webb* (1808), 1 Taunt. 234, that in order to ascertain whether you should imply cross remainders, you have to ascertain whether the testator intended that the whole estate should go over together. If you once get to that point, that he intends the whole estate to go over together, you are not to let a fraction of it descend to the heir-at-law in the meantime. You are to assume that what is to go over together being the entire estate, is to remain subject to the prior limitations until the period when it is to go over arrives " (*per* JESSEL, M.R., in *Maden v. Taylor* (1876), 45 L. J. Ch. 569, at p. 573).

Illustration  
in a will.

In *Maden v. Taylor*, *supra*, a testator devised a fee simple estate in trust for M., B., S., and J. for their respective lives as tenants in common, and on the death of all or any of them, then as to the part of her or them so dying, in trust for all and every the child and children of them respectively and the heirs of their bodies ; and

if any of them should die without leaving issue living at her death, then in trust for the survivors and survivor of them and the heirs of her and their bodies, and if all except one should die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body, and in case of a total failure of issue of them, then in trust for the testator's heirs: —*Held*, that by implication there were cross remainders between the children of the nieces. And see *In re Parker, Stephenson v. Parker*, [1901] 1 Ch. 408.

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Para. (1)  
(b) i.

This rule has practically no application to deeds when these deeds are dealing with the legal fee simple since no intention, however evident, unless expressed in technical words, can carry the fee. But, as before pointed out, technical words are not necessary to convey the equitable fee, and so are not necessary to create cross remainders in it. And there seems no reason why the principle applied in wills should not be implied in deeds dealing with the equitable estate or to life estates or personalty where technical words are not necessary. As a fact the same rule has been held to apply to executory trusts. As to life estates, see *Ashley v. Ashley* (1833), 6 Sim. 358. In *Doe d. Clift v. Birkhead* (1849), 4 Ex. 110, POLLOCK, C.B., where the difficulty as to technical words was got over, applied the second rule as to cross remainders (b) ii. to limitations of legal realty in a deed precisely as if they had been in a will. It seems, therefore, wrong to lay it down broadly, as is done in 1 Wms. Saund. 186 b, that these rules as to implied cross remainders have no application to deeds.

Seldom  
applicable  
to deeds.

#### PARAGRAPH (1) (b) ii.

\* In construing wills, notwithstanding that the doctrine Principle has been disapproved of, it must now be taken as an established rule that clauses disposing of the shares of persons dying before a given period do not, without a clear and distinct indication of intention, extend to shares

**Art. 31.** accruing under such clauses (*Barden v. Barden* (1865), 16 Ir. Ch. R. 421; and 2 Jarman on Wills, 4th ed., pp. 710, 711). The word ‘share’ or ‘portion’ will not, *proprio vigore*, carry an accrued share. There must be an enlarging context giving a clear indication of an intention that the accrued share should pass” (*per* ANDREWS, J., in *Sutton v. Sutton*, [1891] 30 L. R. 251, at p. 260; and see *infra*, p. 187.

“Where distinct legacies are given with survivorship, the general rule is that the clause of survivorship, unless extended by particular words, attaches only to the original shares and does not affect the accruing shares, which therefore become vested in the individuals who are the survivors for the time being. . . . The principal exception is, where the description is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die” (*per* PLUMER, M.R., in *Barker v. Lea* (1823), T. & R. 413, at p. 415).

Illustrations  
in a will.

In *In re Allan, Dow v. Cassaigne*, [1903] 1 Ch. 276 (cited *supra*, p. 159), a testator gave his residuary estate in trust as to one-fourth part for one daughter for life, with remainder for her children living at her death, and as to the other three-fourths on similar trusts for his three other daughters and their children; and he declared that if any one or more of his daughters should die without leaving issue, their share or shares “shall fall into and become part of my residuary estate and be held and disposed of on the same trusts as are hereinbefore declared”:—*Held*, following the dictum of PLUMER, M.R., in *Barker v. Lea*, *supra*, that the testator’s evident intention was to treat the whole residuary estate as an aggregate fund, and that the accruer clause carried both original and accrued shares.

In *Sutton v. Sutton*, [1891] 30 L. R. 251 (on appeal, [1892] *ibid.*, p. 261), a married woman by deed appointed certain lands held in trust under her marriage settlement, to Justin one portion, to John another portion, and to Mathew another portion. She then appointed the rest of her realty to Justin, John and Mathew equally as tenants in common. All these appointments were made subject to the proviso that should any one or more of the said Justin, John or Mathew die without leaving any issue of his or their body or bodies living at his or their decease, then the parts of the land thereby appointed to such son or sons so dying should go to the survivors or survivor of the said Justin, John and Mathew, and in case all of them should die without leaving issue living at the death of such survivor, then the part or shares of the said lands and also the part or portions of the said lands which should come to the survivors or survivor of them by reason of the decease of any of them, the said Justin, John and Mathew dying without leaving issue living at his decease, should go and belong to her daughters Clare and Catherine:—*Held*, that there were no cross remainders in the accrued shares.

This decision was not arrived at unanimously either in the Court of Exchequer or the Court of Appeal. ANDREWS, J., in delivering the judgment of the majority in the former court, after the words cited above, went on to say (at p. 260): “The present is not like the case of a money fund with an obvious intention to keep it as an aggregate fund. It is a case of lands, expressly divided by the appointor into separate portions to be separately held and enjoyed by her sons, and not kept together as an aggregate estate; and further it appears to me to be a case in which the appointor has interpreted her own language, and shown by a clause subsequent to that on which the question arises that the clause in question was not intended to carry accrued shares, which, when she wished to pass, she did so

Art. 31.

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 Para. (1)  
(b) n.

 Case arising  
on a deed.

**Art. 31.**

—  
Para. (1)  
(b) ii.

by adding express words to the very words under which, in the clause in question, the defendant contends the accrued shares passed without any such added words." *Cf. Doe d. Clift v. Birkhead* (1849), 4 Ex. 110.

## PARAGRAPH (2).

Gifts by  
necessary  
implication  
in wills.

As to the exception stated in paragraph (2), it is based on the consideration pointed out by KEKEWICH, J., in *Re Springfield, Chamberlin v. Springfield supra*, p. 180. A gift is made after the death of A. to B., who would take the property so given if it had not been disposed of by the will. No express gift is made of the property during A.'s life, and therefore *prima facie* it is undisposed of. But if treated as undisposed of during A.'s life, B. takes the property, not on A.'s death as the testator intended, but immediately on the testator's death. This renders the gift on A.'s death meaningless, and as presumably the testator meant something by it, the court holds that he must have meant that the property should go to A. during A.'s life, which is the only possible reading of the will which could make effectual the intention of the testator that B. should have the property only on A.'s death.

Now, in order that this reasoning may apply, it is clear that B. must be the person, or if there be more than one person who would take, all the persons and nobody but the person or persons who would take, if the property given were undisposed of by the will. Accordingly, if B. be one only of several co-heirs, where the gift is of realty (*Barnet v. Barnet* (1861), 29 Beav. 239; *In re Willatts, Willatts v. Artley*, [1905] 1 Ch. 378; reversed on another point, [1905] 2 Ch. 135), or not the sole next of kin according to the statute where the gift is of personalty (*In re Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603), or (although the heir or the sole next of kin) he has somebody else taking with him (*Ralph v. Carrick* (1879), 11 Ch. D. 873), the rule would not apply. The rule will not be extended by the court.

The exception in the second part of the rule is in principle the same as the doctrine which applies to gifts both by will and deed, namely, that if land be given to a donee "and his heirs" with a limitation over in default of "heirs" to some one who might be an heir of the donee's, though he could not be the heir of the donee's body, the donee shall take not a fee simple but a fee tail (*Webb v. Hearing* (1617), Cro. Jac. 415; *Doe d. Littledale v. Smeddle* (1818), 2 B. & Ald. 126; *In re Smith's Estate* (1891), 27 L. R. Ir. 121).

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Para. (2).  
Gift over  
in default  
of "heirs"  
sometimes  
passes estate  
tail.

### ART. 32.—*Legacies to Executors.*

1. When a legacy not of a residuary nature is given to an executor, the presumption is that it is given to him in his character as executor, and conditionally upon his accepting the office. This presumption may be rebutted by intrinsic or extrinsic evidence showing a contrary intention on the part of the testator.

2. Where the residuary estate is left to executors upon trusts declared by the will then, in so far as such trusts fail or do not exhaust the estate, what is left undisposed of is held by the executors as trustees for the heir or next of kin, or, in default of heirs or next of kin, for the Crown.

3. Where residuary personalty is not left to the executors as trustees, but is undisposed of by the will, the executors, in the absence of any intention expressed or implied in the will to the contrary, hold it in trust for the next of kin of the testator, but if there be no next of kin, they take it beneficially. In the latter

**Art. 32.** case, if there is any intention expressed or implied that the executors should not take beneficially, they hold the residuary personalty in trust for the Crown.

#### PARAGRAPH (1).

"I take the rule to be correctly stated in Williams on Executors (7th ed., p. 1281) : 'The presumption is, that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will, to repel the presumption.' The author says 'arising on the will,' but I think to rebut this, as well as any other, presumption, parol evidence may be admitted" (*per* COTTON, L.J., in *In re Appleton, Barber v. Tebbit* (1885), 29 Ch. D. 893, at p. 895).

The fact that the legacy precedes the appointment as executor, or that several executors are given legacies varying in amount, is not sufficient to rebut the presumption (*In re Appleton, Barber v. Tebbit, supra*).

It may, however, be rebutted if another motive is expressed as influencing the testator in making the gift (*Babb v. Yelverton* (1871), 13 Eq. 131), and it does not arise if the gift is one of the residue or of a share of the residue (*Christian v. Devereux* (1841), 12 Sim. 264).

#### PARAGRAPH (2).

At all times when personalty was bequeathed to executors as trustees, if the trusts declared failed or if they did not exhaust the personalty bequeathed, the executors were trustees of the whole or the residue for the next of kin ; or, if there were no next of kin, for the Crown as *bona vacantia* (*Ellcock v. Mapp* (1851), 3 H. L. Cas. 492 ; and see *In re Bond, Paines v. Att.-Gen.*, [1901] 1 Ch. 15). But in the case of realty, in such case the executors were

trustees for the testator's heir at law, but if there were no heirs, then they held for their own benefit as *terre tenants* (*Cox v. Parker* (1856), 22 Beav. 168). Now under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), in the case of realty, the equitable realty undisposed of escheats to the Crown (*In re Wood, Att.-Gen. v. Anderson*, [1896] 2 Ch. 596).

**Art. 32.**

Para. (2).

## PARAGRAPH (3).

The rule formerly was that the trustees were entitled to hold personalty coming to them *qua* executors and undisposed of by the will for their own benefit against both the Crown and the next of kin. By the Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), where there is any next of kin the executors are now to hold undisposed of personalty in trust for such next of kin, but in the absence of next of kin their title is still good against the Crown. But this rule does not apply where there is anything to the contrary in the will (*Williams v. Arkle* (1875), L. R. 7 H. L. 606). The most usual example of a provision to the contrary is where by a previous clause of the will a legacy is expressly given to the executor (*Fenton v. Nerin*, [1893] 31 L. R. 478). It has been held that the Executors Act, 1830, applies to express gifts of residue to executors (*Love v. Gaze* (1845), 8 Beav. 472), but this seems inconsistent with *Williams v. Arkle, supra*. And in any case the executor is not an express trustee, and so claims by the next of kin will be barred after twelve years (*Re Lacy, Royal General Theatrical Fund Association v. Kydd*, [1899] 2 Ch. 149).

ART. 33.—*Gifts of Income of Residuary Personalty.*

In the absence of anything to the contrary in the will, the donee of a life or other limited interest in the income of the residue of a testator's personal estate is

**Art. 33.** in so far as such estate consists of wasting or reversionary interests or unauthorised securities, entitled, not to the actual income of such interests, but to the income which such interests would produce if they were at the testator's death sold and the proceeds invested in trust securities.

**Authorities.** "So far as I am aware, the rule in *Howe v. Earl of Dartmouth* has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. The court assumes an intention that the legatees should enjoy the same thing in succession, and, as the only mode of giving effect to such intention, it directs the sale of such parts of the residuary estate as are of a wasting or reversionary or unauthorised character. See *Pickering v. Pickering* (1839), 4 My. & Cr. 289, at p. 298, and *Macdonald v. Irvine* (1878), 8 Ch. D. 101, at p. 112. But the rule does not apply to any bequest which is specific as distinguished from residuary" (*per* COZENS-HARDY, J., in *In re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779, at p. 782).

The rule stated in the article is called the rule in *Howe v. Dartmouth* from the leading case in which it was first fully enunciated. In *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137, the Earl of Strafford left all his personal and real estate to his wife for life and then to his sister for life with absolute gifts over. The personal estate consisted among other things of Bank stock and long and short annuities. The executors did not sell this stock or these annuities:—*Held*, by Lord ELDON, C., that the Bank stock not being—at the time of the decision—a proper trust security and the annuities being wasting securities, it was the duty of the executors to sell them and invest the proceeds in Government securities, and, as between the life tenants and the remainderman, they must be treated as

sold from the time the executors should have sold them. This rule applies even when the sale is properly postponed under a power to do so (*In re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233).

Art. 33.

The interest now allowed in such cases is three per cent. (*In re Woods, Giabellini v. Woods*, [1904] 2 Ch. 4). For mode of calculating the value of wasting and reversionary interests, see Underhill on Trusts, pp. 187 *et seq.*; Strahan's Equity, pp. 104 *et seq.*

#### ART. 34.—*Substituted and Cumulative Legacies.*

(1) Where two legacies of the same amount are given by the same instrument to the same person the second legacy will be presumed to be merely a repetition of the first.

(2) Where two legacies of the same amount are given by different instruments to the same person, then *prima facie* the second legacy is in addition to the first, unless the two legacies are not merely of the same amount, but expressed to be given for the same motive, in which case the second legacy will be presumed to be a repetition only of the first.

(3) A repeated or additional legacy is *prima facie* given subject to the same conditions as the first legacy.

#### PARAGRAPH (1).

Thus in *Garth v. Meyrick* (1779), 1 Bro. C. C. 30, a Illustrations, will contained the two following gifts: "I give to £1,000 old South-sea annuities, to be transferred into her own name," and again towards the end of the will "I give to £1,000 old South-sea annuities as aforesaid":—*Held*, that the legatee took only one legacy. In the same will the residue was left equally among the testator's six

**Art. 34.** grandchildren *nominatim*. In naming them, however, one child (Ann) was mentioned twice, while another (Elizabeth) was omitted:—*Held*, that Ann took only one share and Elizabeth also took one. And see *Greenwood v. Greenwood* (1776), 1 Bro. C. C. 30 n.

Para. (1).

If the legacies are unequal (*Adnam v. Cole* (1843), 6 Beav. 353), or one is specific or pecuniary and the other residuary (*Kirkpatrick v. Bedford* (1878), 4 App. Cas. 96), or if there appears to be any such intention (*Burkinshaw v. Hodge* (1874), 22 W. R. 484), the legatee takes both gifts.

In the last case a testator directed his trustees to convert his personal estate and stand possessed of the proceeds on certain trusts, among others “on trust to pay £2,000 to each of his sons who should attain twenty-one” and “on further trust to set apart and pay over the sum of £2,000 to each of his sons on their respectively attaining twenty-one.” He also directed his trustees to divide the residue “after full payment and setting aside of the sums directed to be paid and set aside”:—*Held*, that the rule as to double gifts in the same instrument did not apply.

#### PARAGRAPH (2).

Authority.

The general rule is that gifts of the same sum to the same person for the same cause, “are to be construed as substitutionary and not cumulative. . . . It is very difficult, to my mind, to apply that rule. I do not know exactly what is meant by the expression ‘the same cause,’ as used in the rule. When a man leaves a legacy to a child, it is because he is a child: if he leaves a legacy to a friend, it is because he is a friend that he gives it. Perhaps the same might be said of every case of testamentary bounty, except the giving a certain sum to an executor for his trouble” (*per* JAMES, L.J., in *Wilson v. O’Leary* (1872), 7 Ch. 448, at p. 454).

Illustrations.

In that case a testator by one codicil gave certain pecuniary legacies to certain persons whom he described

as friends and a year's wages to each servant. By a second codicil he gave legacies to all the persons mentioned in the first save one, and also to a person not mentioned in the first, and also a year's wages to each of his servants. All the legacies were of the same amount except in three cases where the amount given was smaller :—*Held*, that the legacies were not substituted, but cumulative. And see *Mayne v. Woodward*, [1893] 31 I. R. 154 ; *Strong v. Ingram* (1833), 6 Sim. 197.

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Para. (2).

The rule that legacies given by different instruments are cumulative is more often excluded by implied intention than by the proviso stated in the article. Often it is clear that a codicil is intended to be in substitution for part of the will (*Tuckey v. Henderson* (1862), 33 Beav. 174), or is explanatory of the will (*Fraser v. Byng* (1829), 1 R. & M. 90), or is a mere repetition of part of the will or of a preceding codicil (*Whyte v. Whyte* (1873), 17 Eq. 50), in all of which cases the second legacy is construed to be in substitution of the earlier one.

## PARAGRAPH (3).

“ When the thing bequeathed by the codicil is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents. Therefore, the legacy duty on the annuity given by the codicil, must be paid out of the testator's residuary estate ” ( *per* SHADWELL, V.-C., in *Earl of Shaftesbury v. Duke of Marlborough* (1835), 7 Sim. 237, at p. 238). Authority.

In that case a testator by his will had given an annuity to his grandson and directed his executors to pay the legacy duty on all the legacies and annuities given by his will. By a codicil he gave an annuity to his grandson in lieu of that given by his will :—*Held*, that it was given free from legacy duty. And see *In re Boddington, Boddington v. Chiriat* (1884), 25 Ch. D. 685 ; *Re Bengon, Bengon v. Griere* (1884), 51 L. T. 116 ; *Re Colyer*, Illustrations.

- Art. 34.** *Millikin v. Snelling* (1886), 55 L. T. 344; and *cf.*  
 Para. (3) *Strong v. Ingram* (1833), 6 Sim. 197, where the conditions  
 were made applicable to the legacies “hereinafter  
 given.”

#### ART. 35.—*Priority of Legacies.*

General legacies are *primâ facie* payable *pari passu* out of the testator's personalty, and nothing will give any of them priority over the others except an express direction in the will that they shall be paid in priority to the others, or an implied postponement of the others by a direction which in effect makes them payable out of the residuary estate.

“It is a well-established rule that a mere direction to pay a legacy immediately, or within one month, or within three months after a testator's decease, is no evidence of an intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is presumed that the testator intended all the legacies to be paid in full when he gave them” (*per* CHITTY, J., in *In re Schweder's Estate*, *Oppenheim v. Schweder*, [1891] 3 Ch. 44, at p. 45).

In the same way such expressions as “in the first place,” “in the second place,” etc., do not affect the priority of the legacies (*In re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798).

But where there is a gift of certain legacies which are charged upon the whole personalty, and afterwards legacies are given out of the remainder of the personalty, the first given legacies have priority. See *In re Hardy, Wells v. Borwick*, *supra*; *In re Smith, Smith v. Smith*, [1899] 1 Ch. 365.

## CHAPTER II.

## GIFTS WITHOUT WORDS OF LIMITATION.

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ART. 36.—*Gifts of Corpus without Words of Limitation.*

(1) A grant of the legal estate in realty without apt words of limitation passes only an estate for the life of the grantee except the grantee is—

- (a) The Sovereign;
- (b) A corporation aggregate more than one of whose members is competent to take;
- (c) The “heirs” or the “heirs of the body” of any person taking as purchasers.

Or except the grant is—

- (d) By way of release as between coparceners or joint tenants in fee or reversioner in fee and tenant, or is of an incorporeal hereditament to the tenant in fee of the land;

- (e) By way of partition between coparceners;

in all of which cases the fee or fee tail, as the case may be, passes without words of limitation.

- (2) A grant of the equitable estate in realty arising under an express trust without apt words of limitation

**Art. 36.** passes *primâ facie* an estate for life merely. But if it appears from the whole deed that it was the grantor's intention to pass a fee tail, or the fee simple, that estate will pass.

(3) A devise of realty without apt or any words of limitation, passes all the estate the testator had power to devise in such realty, unless a contrary intention appears by the will.

**Authorities.** “For if a man would purchase lands or hereditaments in fee simple it behoveth him to have these words in his purchase: To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words: To have and to hold to him for ever; or by these words: To have and to hold to him and his assigns for ever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an inheritance in all feoffments and grants” (Litt., s. 1.)

“Where an intention to confer more than a life estate is not expressed or sufficiently shown upon the face of the instrument, then, in a deed, a simple trust of real estate for A. without any mention of the heirs, does not give more than a life estate. No case, however, has been cited where such a limitation of a trust has not been held to confer the equitable fee where the intention to do so was expressed or sufficiently shown upon the face of the instrument” (*per* JOYCE, J., in *In re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487, at p. 494).

“(1) In a deed it shall be sufficient in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or

in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

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“(2) This section applies only to deeds executed after the commencement of this Act” (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51).

“Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will” (Wills Act, 1837 (1 Vict. c. 26), s. 28).

As to the old law before the Wills Act, see *Hill v. Brown*, [1894] A. C. 125.

With regard to the operation of the general rule stated in the article, this point is to be noticed: The grant or devise of the rents and profits of land is the same as the grant or devise of the land itself; and accordingly, the grant of these, to carry more than a life interest, must have apt words of limitation to pass a greater estate, while a devise of them, if without words of limitation, will carry the fee. See *infra*, p. 200. As to a devise of the *occupation* of realty without words of limitation, see *Coward v. Lartman* (1888), 60 L. T. 1.

Explanation  
of article.

#### PARAGRAPH (1).

As to the exceptions set out in the first part of the article:

Exceptions.

- (a) A grant to the sovereign of freehold lands will carry the fee, though no words of limitation are used, at any rate if the deed of grant be enrolled. “If a man give lands to the king by deede inrolled, a fee simple doth passe without these words (successors or heires)” (Co. Litt. 9 b).

Sovereign.

**Art. 36.**

Para. (1).  
Corporation  
aggregate.

- (b) The same is the case with a corporation aggregate, where more than one member can take: "If a feoffment or grant be made by deed to a mayor and commonalties or any other corporation aggregate of manie persons capable, they have a fee simple without the word (successors)" (Co. Litt. 9 b). Where only one member of the corporation only can take, it seems the words "and successors" must be added (1 Roll. Abr. 832).

It is to be remembered in this connection, that the apt words of limitation of a fee to a corporation *sole*, are to the representative for the time being of the corporation, and "his successors," and that s. 51 of the Conveyancing and Law of Property Act, 1881, permits the substitution of "in fee simple" for "and his heirs" merely. The consequence seems to be, that it is still necessary to convey to a corporation *sole* and "his successors." If the limitation be to the corporation *sole* "in fee simple," the effect would seem to be the same as a limitation before the Act to the corporation and his heirs would have been, namely, to vest a life estate in the person representing the corporation for the time being. See Co. Litt. 94 b; *sed quere*: see Key and Elphinstone's Conveyancing, 5th ed., at p. 393, where it is said that the effect is to vest the fee in him.

"Heirs" and  
"heirs of the  
body."

- (c) A grant to the "heirs" or "the heirs of the body" as purchasers conveys to the person or persons answering that description at the death of the person whose heirs or heirs of the body he or they is or are, a fee simple or a fee tail, though no words of inheritance are added to the description of "heirs" or "heirs of the body." The addition, however, of words of inheritance to these descriptions is often of great importance in determining whether or not the persons answering the description take as purchasers.

See the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, as to the character in which the heir takes in the case of devises to testator's heirs, and in what character the settlor takes when the ultimate remainder under the settlement is reserved to him and his heirs or "to his right heirs" (*Owen v. Gibbons*, [1902] 1 Ch. 636).

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Para. (1).

It should perhaps be noted that when the grant is to the heirs or heirs of the body of a living person other than the grantor, the estate granted is a contingent remainder or executory devise or use; but when to the heirs of the grantor himself, the estate is a vested estate in the grantor himself, the heirs taking nothing under the grant. "If a man make a gift in taile, or a lease for life, the remainder to his own right heires, the remainder is void, and he hath the reversion in him; for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said that *hæres est pars antecessoris*" (Co. Litt. 22 b).

And it should further be noted that the words "heirs" or "heirs of the body" in order to pass the fee or fee tail must be in the plural. A grant to the "heir" of A. will carry merely a life estate. See *per* LINDLEY, L.J., in *Evans v. Evans*, [1892] 2 Ch. 173, at p. 184. (Why the Lord Justice refers there to the fact that the deed before the court was executed in 1854 as a reason for the doctrine he lays down is hard to say, as the doctrine seems equally applicable if the deed had been executed the day before his decision.) Where, however, the words are "heir or heirs" a fee simple would pass (*Bony v. Taylor* (1614), 2 Roll. 253).

Section 51 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), merely permits the substitution of "in fee simple" for "heirs," and "in tail," etc., for "heirs of the body," etc. In no other respect does it relax the severity of the common law rule. Thus, in *In re Ethell and Mitchell and Butler's Contract*, [1901] 1 Ch. 945, in a reconveyance of the legal estate in realty

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Para. (1).

by mortgagees to the mortgagor, the land was conveyed to the mortgagor "in fee" (without "simple") :—*Held*, that a life estate only passed to the mortgagor.

Releases.

The rule as to exceptions (d) and (e) is thus stated : Words of inheritance are not necessary to pass the fee in "certain releases and that three manner of waies : 1. When an estate of inheritance passeth and continueth ; as if there be three co-parceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (heirs) by Littleton's own opinion they have a fee simple as appeareth hereafter. 2. By release when an estate of inheritance passeth and continueth not, but is extinguished : as where the lord releaseth to the tenant or the grantee of a rent, etc., release to the tenant of the land generally all his right, etc., hereby the seigniori rent, etc., are extinguished for ever, without these words (heirs). 3. When a bare right is released, as when the disseisor release to the disseisor all his right, he need not (saith our author in another place) speak of his heires" (Co. Litt. 9 b ; and see *ibid.* for other instances where the fee might pass without words of inheritance, which are now either obsolete, such as fines *sur consueance de droit*, etc., or which do not come within the scope of this work, as grants of peerages).

## PARAGRAPH (2).

The whole subject of the limitation of equitable estates in realty arising under express trusts was considered recently with great care in *In re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487 and *In re Irwin*, *Irwin v. Parkes*, [1904] 2 Ch. 752. The result of these two cases is set down in paragraph (2). In the first copyholds were surrendered to trustees and their heirs in trust for A. for life, then for A.'s husband for life, then on death of the survivor for the children of the marriage as tenants in common and in default of children for such uses as A.

might declare, with remainder to the right heirs of A.:—*Held*, that the children of the marriage were tenants in common in fee simple.

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Para. (2).

In *In re Irwin, Irwin v. Parkes, supra*, on the other hand, the equitable owner in fee simple by a post-nuptial settlement which recited that the settlor was absolutely entitled to freehold hereditaments “which said freehold property” he was desirous of settling for the benefit of his wife and children. It was then witnessed that in pursuance of such desire, he assigned “the said freehold hereditaments” to the trustees (without the word “heirs”) upon trust for sale and investment and to pay the income to his wife for life, then to himself for life, and then for their children. The deed contained a power to appoint new trustees:—*Held*, that there passed to the trustees only an estate for the life of the trustees named in the deed and the survivors of them.

### PARAGRAPH (3).

The rule as to devises applies to all corporeal hereditaments subsisting before the will but not to those created by the will itself. Thus, if a testator owns, amongst other things, a rentcharge in fee simple issuing out of Whiteacre, a devise of this rentcharge without words of inheritance, will pass the fee in the rent: but if he owns Whiteacre in fee simple and by his will charges Whiteacre with a certain rent or annuity in favour of a devisee, and uses no words of limitation, the devisee will take merely a rent or annuity for life (*Nichols v. Hawkes* (1853), 10 Hare, 342; *In the Estate of Forster* (1889), 23 L. R. Ir. 269). The Wills Act has not altered the law with regard to annuities and such like incorporeal hereditaments created by the will itself, which now, as before the Act, are subject to the rule stated in the next article.

As an example of a contrary intention within s. 28 of the Wills Act, *Crump v. Crump*, [1900] A. C. 127, is in point. There a testator left his fees simple to trustees in trust to pay the rents to S. M., but in case he

- Art. 36.** encumbered the lands or rents from that time the testator  
 Para. (3). revoked the gift of rents "from S. M. and from his heirs  
 male," or should S. M. not forfeit the same and "die  
 without male issue him surviving," he bequeathed the rents  
 and estates to R. M. and his issue male in tail male: -  
*Held*, that S. M. took an estate in tail male.

ART. 37.—*Bequests of Annuities without Words  
 of Limitation.*

A bequest or devise, without words of limitation, of an annuity or rentcharge created by the will itself, passes merely an annuity or rentcharge for the life of the donee unless a different intention appears from the will.

- Authorities.** "An annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of £100 per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of £100; that is of as many sums of £100 as the donee shall live years" (*per* Lord COTTENHAM, C., in *Blewitt v. Roberts* (1841), Cr. & Ph. 274, at p. 280).

"I will read from the decision of Mr. Justice FRY, as he then was, in *Blight v. Hartnoll* (1881), 19 Ch. D. 294, what I take the law to be. He says (at p. 296): 'As a general rule there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A., and nothing more.' That seems to be uncommonly good sense. If I give a person an annuity I do not mean that it is to last for ever. If I meant it to last for ever I should give my money in another shape. No doubt that is the legal effect *prima facie*. It is equally free from doubt that where the testator indicates the existence of the

annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity.' That is to say, if the annuity is given, not only to the person but afterwards to others, in language which shows there is to be no end of it, of course it is a perpetual annuity. 'It is equally without doubt that there are cases in which the court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises'" (*per* LINDLEY, L.J., in *Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222, at p. 228).

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As said by LINDLEY, L.J., in *Re Morgan, Morgan v. Morgan*, (*supra*, at p. 228), the law, as stated in the above article, is not open to much doubt; "the application of it is the difficulty." And the application of it has proved so difficult that it is practically impossible to reconcile the decisions upon it (*cf.*, for example, *Re Morgan, Morgan v. Morgan, supra*, and *Bent v. Cullen* (1871), 6 Ch. 235).

Application  
of rule  
stated in  
article.

The chief of the so-called exceptions to the rule, as stated by FRY, J., in *Blight v. Hartnoll, supra*, that a gift of an annuity not subsisting when the will is made is a gift of an annuity merely for the life of the annuitant, is really not a case of gift of annuities at all. The gifts within that exception are gifts of *corpus*, and the annuity is used as a mode of ascertaining the amount of *corpus* which the testator desires to go under the gift. As instances to show this, cases like *Stretch v. Watkins* (1816), 1 Mad. 253, and *Rawlings v. Jennings* (1806), 13 Ves. 39, may be cited. In the former the bequest was of "£120 per annum that is to say the interest of £4,000 of my 3 per cent. consols." In the latter it was "£200 a year being part of the moneys I have in bank security." The more

Gift  
nominally  
of annuity  
sometimes  
really of  
income of  
fund.

**Art. 37.** recent case of *Hicks v. Ross* (1872), 14 Eq. 141, is very instructive upon this point. There a testator gave all his property to trustees on these trusts : he left "the sum of £56 per annum to be paid quarterly to his wife" ; he left to A. B. "the sum of £50 during her life." He left £800 per annum out of the proceeds of an East Indian estate to be appropriated by the trustees to the maintenance and education of the children of his daughter J. H. "Under forfeiture of" the £800, the children were to take testator's name, and various provisions were made for the appropriation to their mother of the portion of any child who died, and for the forfeiture to the other children of the portion of any child who got in debt. Powers were given the trustees to sell the East Indian estate should the profits of working it not be sufficient to pay the annuities of the children, and the proceeds were to be invested "in the names of the trustees for the benefit of the children." Should the profits not reach £800 annually from the working or sale of the estate, the trustees were to "charge the residue" of the testator's property to make up the annual sum of £800. Should the sale realise more than enough, the extra proceeds were to be invested for the benefit of the children's mother : but the sum to be paid to her from such investment was not to exceed £500 annually :—*Held*, that while the annuity to the wife was for life only, the annuities to the daughter and her children were perpetual.

Here it seems clear that the testator, though nominally giving by way of annuity, was really dealing with the *corpus* of the estate referred to. But if it is clear that he is dealing with annuities merely, that is, making the annual sums given merely a charge on the property, and not giving the property itself in the form of income, the annuities or rentcharge will be for life only, even if they appear from the will itself to absorb the whole income or rents and profits of the property.

In some old cases, such as *Ross v. Borer* (1862), 2 Jo. & H. 469, and *Kerr v. Middlesex Hospital* (1852), 2 D. M. & G. 576, it was held that a mere direction that an annuity should be provided out of "government securities," or out of "the funds" was sufficient to make the gift a gift of the income of the stock to be bought to secure the annuity. It is very doubtful if these cases would be followed now. It seems as if the tendency of the courts was to hold that the annuity is a gift of income only where the income of property is specifically appropriated to satisfy the gift. It is clear that a mere direction that the executors shall retain and invest sufficient of his estate to pay certain annuities is not enough to make such annuities perpetual (*Re Taber, Arnold v. Kayers* (1882), 46 L. T. 805); nor is a direction that the annuity shall "be secured" (*In re Lord Stratheden and Campbell, Cowper v. Stratheden and Campbell*, W. N. (1893), 90).

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“Government securities.”

It is somewhat difficult to say why the first so-called exception is considered an exception at all. It seems plainly a case of the ordinary application of the rule. Nothing can be more certain than that a gift over *simpliciter* to B. of an annuity given to A. for life only, gives B. a life interest in succession to A. (*Wilkins v. Jodrell* (1879), 13 Ch. D. 564; *Blight v. Hartnoll* (1881), 19 Ch. D. 294). In order that B. may take more than a life estate, there must be some indication in the will that the testator intended him to take more. If there be such an indication the annuity will be such as is intended, whether it is given in succession to a life interest or directly to the donee.

Gifts over of annuities.

As an example of a gift over to another or others which does not come within the exception, *Ward v. Ward*, [1903] 4 L. R. 211, is in point. There a testator left annuities to his wife for life, to his daughter, to his son T. W. and to W. W. Then he directed that on the death of his wife, her annuity should be divided equally between T. W. and

Example of life annuity.

**Art. 37.** W. W., and the daughter and another son, and that after the daughter's death her annuity was to be divided equally between her children: —*Held*, that the annuities were for lives merely and not perpetual.

Example of  
perpetual  
annuity.

As an example of the exception, *Mansergh v. Campbell* (1858), 3 De G. & J. 232, may be cited. There the gift was of an annuity to A. B. for life, and after her decease to her children as tenants in common. On the youngest child attaining the age of twenty-one, the testator directed the said annuity to be sold, and the proceeds divided equally among the children. Here it was held that the annuity to the children must be a perpetual annuity: for, if it were intended to be for the lives of the children only, then there would be not one annuity to be sold, but as many annuities as there were children (*cf. Evans v. Walker* (1876), 3 Ch. D. 211; *Blight v. Hartnoll* (1881), 19 Ch. D. 294).

Circum-  
stances  
indicating  
annuity  
was to be  
perpetual.

*Mansergh v. Campbell*, *supra*, indicates the circumstances which, in the absence of express words, the court will take into consideration in deciding whether an annuity or rentcharge is for life or is to be perpetual, or for a certain number of years. The fact that the limitations of the use are inconsistent with the annuity being for life (*Barden v. Meagher* (1867), 1 R. 1 Eq. 246), or that the whole estate is dealt with by way of gifts of annuities or income and not of *corpus* (*Bent v. Cullen* (1871), 6 Ch. 235), or that the annuity is made payable out of a certain property (*Hicks v. Ross* (1872), 14 Eq. 141), is a circumstance tending to show that an annuity in perpetuity was intended. But none of them will make the annuity one in perpetuity if the court gathers from the whole instrument that such was not the intention of the testator (*In re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222).

Sometimes when a duty is attached to an annuity, the annuity will continue payable after the death of the annuitant if the object of the duty survives. Thus, in *In re*

*Yates, Yates v. Wyatt*, [1901] 2 Ch. 438, a testator after directing the trustees of his will to provide such sum as should together with her income under the marriage settlement amount to £1,000 a year, made a "further annuity" to his widow of £300 per annum "until my daughter C. shall attain the age of twenty-one years, and to be applied by her my said wife in and about the maintenance of my said daughter." The widow died before C. attained twenty-one :—*Held*, that the annuity continued payable for C.'s maintenance till C. attained that age.

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## CHAPTER III.

## GIFTS WITH WORDS OF LIMITATION.

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ART. 38.—*Where the Rule in Shelley's Case does not apply.*

Where in a will or deed there is a gift of hereditaments either indefinitely or for life, and there is a further gift of an estate of inheritance in the same hereditaments to the donee's "heirs," or "heirs of the body," the question whether the words "heirs" or "heirs of the body" are to be read as words of purchase (and so passing the fee in remainder to the person who may prove to be the donee's heir or heir of the body), or as words of limitation of the estate of the donee (and so passing the fee simple or fee tail to the donee under the rule in *Shelley's Case*), will depend upon whether the words "heirs" or "heirs of the body" are used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, they include the whole line of succession capable of inheriting.

Authorities. "The rule in *Shelley's Case* (1579), 1 Rep. 93 b, is this: 'It is a rule of law when the ancestor by any gift or con-

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veyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases "the heirs" are words of limitation of the estate and not words of purchase.' Every part of that statement is, I think, deserving of attention from the opening words, which declare the rule to be a 'rule of law,' to the last clause which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of heritable blood has the same effect [*in a will*] as the word 'heirs,' though perhaps it was not always so (1 Rep. 106 b. n. (i.) 5), and though it seems to have been thought at one time, and indeed it was argued as late as 1844 (*Harrison v. Harrison* (1844), 7 M. & G. 938), that in the absence of technical words the governing principle was not the rule in *Shelley's Case*, but the doctrine of *cy-près*. . . . The question now, in every case, must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression which may have a like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting" (*per* Lord MACSAGHTEN, in *Van Gratten v. Fowell*, [1897] A. C. 658, at pp. 667 and 677).

As regards deeds "the rule in *Shelley's Case* (1579), 1 Rep. 93 b, only applies in terms where the word used is 'heirs' in the plural. The addition of the ordinary words of inheritance 'and their heirs,' makes no difference, even though appended to the words 'heirs of the body.' But if the word 'heir' in the singular be used *in a devise*, as 'to A. for life with remainder to his heir,' the rule still applies (*King v. Melling* (1672), 1 Vent. 214). However, where 'heir' in the singular is used, the case is more easily taken out of the rule. The addition of words of limitation, as 'and the heirs or heirs of the body of that heir,' is held

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then to be sufficient to show that the heir is *persona designata*; *Archer's Case* (1597), 1 Rep. 66 b; *King v. Melling* (1672), 1 Vent. 214; *Greates v. Simpson* (1864), 10 Jur. 609; 12 W. R. 773; *per* KAY, L.J., in *Evans v. Evans*, [1892] 2 Ch. 173, at p. 189.

Rule in  
*Shelley's Case*  
a rule of law.

The rule in *Shelley's Case* being a rule of law and not of construction, does not come within the scope of this work. It applies when the limitations in the instrument are such as to bring them within it, whatever may have been the intention of the maker of the instrument. But whether the limitations are such as to bring them within the rule is a matter of construction, and the principle applicable is that stated in the article.

It does not  
apply when  
"heirs" or  
"heirs of the  
body" mean  
*persona*  
*designata*.

Shortly, that principle is this: When there is a gift of a life estate to an ancestor, and a gift in succession mediately or immediately to his heirs in the same instrument, whether the rule in *Shelley's Case* applies depends on whether the word "heirs" is intended to be used as a general term, or as a specific description. If it is used as a general term including all who could inherit from the ancestor, the rule applies, whether the settlor intended or did not intend the ancestor to take more than a life estate. If it is used as a specific description of an individual to be ascertained on the ancestor's death, then the rule does not apply, and the ancestor takes merely a life estate, while the individual who will be his heir takes a remainder in fee, contingent on his being the ancestor's heir at the ancestor's death.

The rule applies equally when the expression is not "heirs" but "heirs of the body," or "heirs male of the body," or "heirs female of the body," or in a will "issue," or any other expression which would be equivalent in a will to words of inheritance in a deed (*per* Lord MACNAGHTEN, in *Van Grutten v. Focwell*, *supra*, at p. 677).

It applies, too, when the limitation is to the issue or heirs of the body by a particular marriage. Thus, in

*Pelham-Clinton v. Duke of Newcastle*, [1903] A. C. 111, the devise was to "Charles if he marries a fit and worthy gentlewoman and his issue male to such issue and their male descendants in failure of which," then over :—*Held*, that Charles took a fee in special tail.

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The commonest case of limitations excluding the rule in *Shelley's Case*, is where the limitation over is to the ancestor's "heir" (in the singular) with words of inheritance attached to heir : as, *e.g.*, to "A. for life and on his death to his heir and the heirs of such heir's body." In such a limitation as that A. takes merely for life, and there is a contingent remainder in tail (or in fee as the case may be) to whomsoever may become the heir of his body. The exception is usually called the rule in *Archer's Case*, from the case in Coke's reports, which establishes the exception (1 Rep. 66). It is, however, merely an instance of the application of the general rule that the person to whom the gift over is made, must be *persona designata*. See *per* KAY, L.J., in *Evans v. Evans*, *supra*. And he may be *persona designata* even though the word used is not "heir" (in the singular), but "heirs" in the plural, though as KAY, L.J., in the same case points out, it is then more difficult to hold that he is *persona designata* than where the singular is used. It may be added that the word "heir" is not, properly speaking, a word of limitation or inheritance in a deed, and so if no words of inheritance are added to it (see *per* LINDLEY, L.J., in *Evans v. Evans*, *supra*, at p. 184), or if it is not so explained by the context as to make it equivalent to heirs (*Bony v. Taylor* (1614), 16 Viner, 213), the person answering the description will take only a life estate (*supra*, p. 202).

A multitude of cases might be cited where the limitations have been held to exclude or not to exclude the rule in *Shelley's Case*. Usually, however, these cannot be taken as establishing any rule on the point decided, as they turn

Contrary intention does not prevent rule operating.

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on the words of the particular instrument under construction, and many of the older decisions are now of little authority. See *per* Lord MACNAGHTEN, in *Van Grutten v. Foxwell*, *supra*, at p. 673. It seems clear, however, that no intention on the part of a settlor or testator that the ancestor shall take only a life estate, whether stated in express words as “for life and no longer” (*Macnamara v. Dillon* (1883), 11 L. R. Ir. 29), or gathered by implication, as by his being given liberty to commit waste (*Jones v. Morgan* (1783), 1 Bro. C. C. 206), or being put under an obligation to repair (*Jesson v. Wright* (1820), 2 Bli. 1), or a gift of the surplus income merely during the lives of certain annuitants (*In re Youmans’ Will*, [1901] 1 Ch. 720) will prevent the rule applying. Neither will words of limitation superadded to the word heirs or heirs of the body as a rule (see *supra*, p. 213), nor words of distribution (*Jesson v. Wright*, *supra*), nor both combined. See *Jordan v. Adams* (1861), 9 C. B. (N.S.) 483. If, however, the settlor adds words expressly explaining that, by the words “heirs” or “heirs of the body,” he means sons or children of the ancestor (*Lowe v. Davies* (1729), 2 Ld. Raym. 1561, and *cf.* *Roddy v. Fitzgerald* (1857), 6 H. L. Cas. 823), or if he explains the words by reference to other limitations (*East v. Twyford* (1853), 4 H. L. Cas. 517), this will prevent the application of the rule. But the explanation must be very definite to exclude the rule. Thus, *In the Estate of Baron Keane*, [1903] 1 I. R. 215, a devise was to A. for life “and his issue male in succession, so that every such son may take an estate for life, with remainder to his first and every subsequent son successively according to seniority in tail male”: *Held*, that A. took an estate in tail male.

Example of  
exclusion of  
rule.

A recent instance of limitations in a deed being such as to exclude the rule in *Shelley’s Case*, is the case of *Erans v. Erans*, *supra*. There, in a deed of grant after a life estate to A., there was a limitation to the use “of such person or

persons as at the decease of the said A. shall be his heir or heirs at law and of the heirs and assigns of such person":—*Held*, that A. took a life estate only, followed by a contingent remainder in fee simple to the person who might prove to be his heir, who took as a purchaser under the deed. LINDLEY, L.J., said: "I have found no case in which the doctrine in *Archer's Case* has been applied to a limitation to heirs in the plural; but in this case although the expression 'heir or heirs' occurs, that expression is used in the sense of heir in the singular."

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In *Van Grutten v. Forwell*, [1897] A. C. 658, the rule in *Shelley's Case* was held to apply. There, the limitations were to trustees for the use and benefit of the testator's children living at his death, with power to apply what part of the income trustees approved to the maintenance of such children until they should reach full age or marry, and after that to permit them to take the profits of the land for their lives in equal shares, and on their deaths to stand seised of the lands in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, equally to be divided between them, such lands to be legally conveyed to such heirs of any child or children in equal shares as they should respectively attain the age of twenty-one or be married, and to their respective heirs and assigns for ever, with power in the meantime to apply the rents and profits in the maintenance and education of such heirs of his child or children. In case there was no child at his death, gift over:—*Held*, that the children surviving the testator took fees tail. Lord MACNAGHTEN, in a judgment which exhausted the learning on the subject, laid down the rule briefly in the words adopted in the article.

Example of application of rule.

In conclusion, three points may be noted. In the first place the rule is not applied so strictly in executory trusts as in executed trusts, or other formal limitations (*Lord Glenorchy v. Bosville* (1733), Cas. t. Talb. 3, and

Where rule is inapplicable.

**Art. 38.** 2 W. & T. Lead. Cas., p. 763 and notes). Thus, if there is a clear intention to give the ancestor merely a life estate, with remainder to the eldest son, the court will so interpret it (*Treor v. Treor* (1720), 1 P. Wms. 622). Further, it is to be remembered that the word "issue," when applied to gifts of realty by a will, is usually read as equivalent to heirs of the body (*Roddy v. Fitzgerald* (1857), 6 H. L. Cas. 823, at p. 872), and so may the word "children," when, by the context, it is made equivalent to "issue" (*Bowen v. Lewis* (1884), 9 App. Cas. 890), and in such circumstances the rule in *Shelley's Case* applies as if the words "heirs of the body" were actually used (*Roddy v. Fitzgerald, supra*). At the same time "issue" is not so technical a phrase as "heirs of the body," and does not imply as "heirs of the body" does, taking by inheritance. And so it has been held that words of distribution in the case of a devise to a life tenant's issue are enough to prevent the rule in *Shelley's Case* applying (*Montgomery v. Montgomery* (1845), 3 J. & Lat. 47; *sed quare*, see *Van Grutten v. Foxwell, supra*, at p. 274). Lastly, it is to be remembered in all cases that the rule in *Shelley's Case* does not apply to limitations where the life estate to the ancestor and the estate of inheritance to the heir or issue are not either both legal or both equitable (*Collier v. McBean* (1865), 34 L. J. Ch. 555), or when the limitation over to the heirs or issue is by way of executory use (*Richardson v. Harrison* (1885), 16 Q. B. D. 85). Nor of course does it apply where the first estate given is a lease for years determinable on death (*Milman v. Lane*, [1901] 2 K. B. 745).

**ART. 39.—Where the Cy-près Doctrine applies.**

Where in a will there is a gift over of hereditaments which is void for remoteness, the preceding estate will be construed as a fee tail under the *cy-près* doctrine if (a) the words of the gift over would, but for the gift over

being void, have been sufficient to carry an estate in fee tail, and (b) the persons who would have taken under the gift over, had it not been void, include all those and only those who will take under the fee tail adopted by the court if it be allowed to descend unbarred.

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“ This doctrine, as I understand it, is nothing more than that which prevails in other cases of giving effect to the general intent, but with this difference, that it is not, as in them, carried into effect at the expense of the particular intent. . . . For example, in the case of limitations under powers, where there is a good gift of a limited estate to a person who is an object of the power, and then a gift over to the children who are not objects of the power, effect may be given to the whole intention by giving to the parent an estate of inheritance by means of which the estate will descend to his children. . . . So in the case . . . of a limitation to an unborn son for life, with remainder to his unborn children in tail, where, as effect cannot be given to the expressed intention, because successive estates cannot be limited to an unborn person and to his issue, an estate tail is given to the party to whom the limitation was made for life ” ( *per* Lord ST. LEONARDS, C., in *Monypenny v. Dering* (1852), 2 De G. M. & G. 145, at p. 172).

In *Monypenny v. Dering* (*supra*, at p. 174), Lord ST. LEONARDS says: “ I apprehend the rule is this, that neither by implication, nor by the doctrine of *cy-près* can an estate be carried to a class, or a portion of a class, for whom the testator never intended to provide. . . . The second branch of the rule as to excluding some one who is an object does not arise in the present case ” ( *per* FARWELL, J., in *In re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502, at p. 506 ).

In *In re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332, a testator, by his will made before the Wills Act, 1837, left real estate to C. G. and M. (without words of

Illustration  
of restrictions  
on rule.

**Art. 39.** — limitation) and declared that they and the survivors of them were to hold in trust to take the income for themselves in equal shares for life, and then after cross remainders on death of C. G. or M. without issue, in trust as to each share for all the life tenant's children equally for life in equal shares, etc., "and so to be continued and distributed in a descending line *per stirpes* from issue to issue for life so long as any issue shall be living descended from my said children, the children of the parent dying taking parent's share equally between them in all cases of decease." The will contained no gift over in case of default of issue :—*Held*, that the *cy-près* rule did not apply, first because there was no gift of an estate of inheritance but merely of perpetual life estate, and secondly, because an estate tail would not carry the realty to all the persons the testator intended to benefit.

In *In re Mortimer, Gray v. Gray, supra*, on the other hand, where the void gift over was such that a fee tail would carry the estate to persons who were not included among the objects the testator intended to benefit, the court held that the rule did not apply, and refused to create a fee tail subject to a contingent remainder which, it was said, would prevent the estate from going to the excluded persons, on the ground that the rule is not to be extended.

Neither of these restrictions on the *cy-près* rule apply where the settlement is by way of executory trust.

#### ART. 40.—*Limitation of Heritable Interest in Personalty passes the Absolute Interest.*

Under a disposition of personalty by will or deed, in language which shows, or is assumed to show, that the testator or settlor intended to pass a heritable interest therein, the absolute interest will pass.

**Authorities.** "It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body,

is an absolute bequest to the first taker. Whatever disposition would amount to an estate tail in land gives the whole interest in personal property : which is incapable of being entailed " ( *per* Sir W. GRANT, M.R., in *Elton v. Eason* (1812), 19 Ves. 73, at p. 78).

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Gift by will to wife and daughter for life, and " for the respective heirs executors or administrators of the survivor of them my said wife and daughter, such heirs, executors or administrators to be ascertained notwithstanding coverture, as if the survivor . . . had died unmarried and intestate." The daughter survived. *Per curiam* : " If the disposition had stopped short before the clause ' such heirs executors or administrators to be ascertained,' etc., etc., the daughter would have been absolutely entitled ; not because the testator intended it, but because the words ' heirs executors or administrators ' must have been taken as words of limitation. That clause, however, showed that the testator did not use them as words of limitation, but as words of gift to an artificial class to be ascertained in a particular way " (*In re Hall, Hall v. Hall*, W. N. (1893), 24).

There seems to be no doubt whatever that any attempt to create a fee simple or fee tail in personalty passes the absolute interest (*Leventhorpe v. Ashbie* (1634), Roll. Abr. 831, pl. 1 ; Tudor L. Ca. R. Pr., p. 382). The cases where this intention is clear arise chiefly when chattels are settled as heirlooms or to accompany realty. Here the first person who takes an estate tail becomes absolute owner of the settled chattels. In order to prevent this limitations are inserted making a gift over of them in case a tenant in tail dies before attaining twenty-one (*In re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496). Another mode is by giving the enjoyment of the chattels to the persons in succession " in actual possession " of the rents and profits of the settled land. Here a tenant in tail who dies before the preceding life tenant takes no interest at all in the settled chattels (*In re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149).

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But a direction in a will that the chattels shall follow the devolution of a dignity "as far as the rules of law and equity will permit" is not sufficient to prevent the chattels vesting absolutely in the first person on whom the title devolves after the life estates (if any) limited in the chattels (*In re Hill, Hill v. Hill*, [1902] 1 Ch. 807).

The real difficulty in other cases is to ascertain whether there was any intention on the part of the settlor to create a heritable interest.

When is the interest given intended to be a heritable interest.

There is no rule of law applicable to limitations of personality like the rule in *Shelley's Case* (*Re Jeaffreson* (1866), 2 Eq. 276). Whatever may be the words used, if it is clear that the intention of the settlor or testator was to give a life interest merely to the ancestor with the absolute interest in remainder to his heirs or heirs of the body, this intention will be observed (*ibid.*). The rule, then, laid down by some writers that "expressions which if applied to realty would confer an estate tail, shall when applied to personal property simply give the absolute interest" (Wm.'s Personal Prop., Part 4, Ch. I.), is too broad. See *Herrick v. Franklin* (1868), 6 Eq. 593).

Examples of application and exclusion of rule.

If the gift is to the donee "and his heirs" or to the donee and "the heirs of his body," or even to the donee "for life and afterwards to his heirs" (*Atkinson v. L'Estrange* (1885), 15 L. R. Ir. 340), or to the donee "and the heirs of his body in equal proportions" (*In re Barker's Trusts* (1883), 52 L. J. Ch. 565), the donee will take the absolute interest unless there is something to show that an estate in fee or in tail to the donee (*Re Russell* (1885), 52 L. T. 559), or at any rate an estate to the donee and his heirs and the heirs of his body to continue as long as the donee had heirs or heirs of the body surviving (*Ex parte Wyndham* (1854), 5 D. M. & G. 188), was not intended. This construction was probably adopted more or less in analogy to the rule in *Shelley's Case*, and there appears to be at present no tendency to

extend it. A very small indication that a life interest to the donee with a gift over to the heirs or heirs of the body, or an absolute interest subject to an executory bequest over, was intended, will be sufficient to prevent its application. Thus, in *Re Russell, supra*, under a gift of £1,000 to the donee, "the same to become the property (at her death) of her heirs," it was held that the donee took merely a life interest with a gift over to whoever should be her "heirs within the meaning of the will." So in *Re Jeaffreson* (1866), 2 Eq. 276, on a gift to trustees upon trust for a donee for life, "and after her decease upon trust for the benefit of the heirs of the body of the donee, first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of twenty-one in such proportions as the donee might by deed grant or by will direct," it was held that the donee took merely a life interest, and on her death the next of kin took as purchasers subject to her power of apportionment.

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In the above cases the words used are "heirs" or "heirs of the body," which are both in deeds and wills technical words of limitation. In wills, where words are used which are non-technical words, but which are nevertheless generally read as equivalent to "heirs of the body," such as "issue," the rule that they are used as words of limitation of an estate tail is less inflexible than when the technical expression is used. Still, *prima facie* a gift of personalty by will to a donee "and his issue," at any rate when there is a gift over in default of issue, gives the donee the absolute interest (*Lyon v. Mitchell* (1816), 1 Mad. 467; *Re Andrew's Will* (1859), 27 Beav. 608). But if the gift be to the donee for life and then to his issue, whether there is a gift over or not on default of issue, the donee takes merely a life interest (*Foster v. Wybrants* (1876), 11 R. 40). And this is the case as far as the personalty is concerned, even if the gift is of a mixed fund, unless it is clear that the personalty was intended

Where words are not "heirs" or "heirs of the body."

## Art. 40.

to go in the same way as the realty (*Jackson v. Calvert* (1860), 1 J. & H. 235). And where the gift of personalty is to the donee and his issue—the donee's interest not being expressly limited to his life—slight indications will be sufficient to induce the court to hold that he and his children were to take in succession (*Parsons v. Coke* (1858), 4 Dr. 296), or jointly (*Law v. Thorp* (1858), 27 L. J. Ch. 649), or by substitution (*Re Stanhope's Trusts* (1859), 27 Beav. 201).

It is to be remembered in connection with this and the following article that “issue,” “descendants,” “child,” and “children” are never words of limitation in deeds (Co. Litt. 20 b).

ART. 41.—*Rule in Wild's Case.*

(1) Where there is a devise to a person and “his children,” if the person has no child at the date of the will the words “his children” will be read as equivalent to “the heirs of his body,” and he will take a fee tail; but if he then has a child or children the words “his children” will be read as words of purchase, and he and his child or children will take absolutely in joint tenancy.

(2) Where there is a bequest or a gift by deed of personalty to a person and his children, the parent and his children will rank as a class and will take absolutely according to the rules applicable to classes (see Articles 19 and 20, *supra*); but slight indications will be sufficient to induce the court to hold that the intention was that the parent should take for life and the children in joint tenancy in remainder.

Rule in  
*Wild's Case*  
applies only  
to realty.

The rule stated in the first part of this article is what is called the rule in *Wild's Case* (1601), 6 Co. Rep. 17,

and is thus expressed by Lord CRANWORTH, C., in *Byng v. Byng* (1862), 10 H. L. Cas. 171, at p. 178: "Where there is a devise of land to a man and his children, and he has at the time of the devise no child, then, *primâ facie*, the word 'children' shall be taken to be a word of limitation, and the first taker shall have an estate tail; but, on the other hand, if the first taker has children at the time of the devise, then the will shall *primâ facie* be construed as giving a joint estate to the first taker and the children as purchasers. I have qualified the rule as stated by Lord COKE by introducing the words '*primâ facie*,' because he certainly did not mean to state the rule as one which must take effect where a contrary intention was apparent; and it is clear that in acting on the rule, in both its branches, the courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator as collected from other passages of his will."

Art. 41.  
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The rule as to gifts of personalty to a donee and his children is thus stated by STIRLING, J., in *Re Wilmot, Wilmot v. Betterton* (1897), 76 L. T. 415, at p. 417: "It has been held that the rule in *Wild's Case* has no application to personalty (see *Audsley v. Horn* (1858), 26 Beav. 195). Under a gift of personalty to A. and his children the parent and children take *primâ facie* concurrently as joint tenants, but slight circumstances have been laid hold of by the courts as enabling them to come to the conclusion that a gift for life to A. with remainder to his children was intended (see *Newill v. Newill* (1872), 7 Ch. 253)."

Rule which is applicable to personalty.

The same rule applies when the bequest is to "A. and his issue" (*Berry v. Fisher*, [1903] 1 L. R. 484).

#### PARAGRAPH (1).

On two points the rule in *Wild's Case* is different from most rules as to the construction of wills. In the first

In applying rule in *Wild's Case* date of the will is considered.

**Art. 41.**

Para. (1).

And child *en ventre sa mère* is regarded as non-existent.

place the will so far as it is concerned, is taken as speaking not from the death of the testator but from the date of the will (*Buffar v. Bradford* (1741), 2 Atk. 220). Accordingly, whether “children” is to be taken as a word of limitation or not, depends on the state of facts at the date of the will. In the second place, a child then *en ventre sa mère* is not to be regarded as born for the purpose of the rule (*Roper v. Roper* (1867), 3 C. P. 33). These distinctions result from the fact that, when the rule came into existence, a will spoke from its execution as to realty, and a child *en ventre* though living for the purpose of taking by inheritance was non-existent for the purpose of taking by purchase.

Power of appointment among children.

The fact that a power of appointment among his children is given to a childless person will not, it seems, prevent the word “children” being read as a word of limitation (*Seale v. Barter* (1801), 2 B. & P. 485; *Clifford v. Koe* (1880), 5 App. Cas. 447). As to what will be considered a sufficient indication that the testator intended the parent and children to take a devise as joint tenants, see *Buffar v. Bradford*, *supra*, and *Griere v. Griere* (1867), 4 Eq. 180; as to what will be considered a sufficient indication that the testator intended the parent and children *not* to take a bequest as joint tenants, see *Vaughan v. Marquis of Headfort* (1840), 10 Sim. 639; and *Audsley v. Horn* (1859), 1 De G. F. & J. 226. And as to what will be a sufficient indication that the testator intended the devisee, though childless, to take a fee simple in a devise subject to be partially divested by the subsequent birth of issue, see *Re Wilmot, Wilmot v. Betterton* (1897), 76 L. T. 415.

Art. 42.  

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ART. 42.—*Meaning of "Heirs Male" in Deeds  
and Wills.*

(1) A grant by an owner in fee simple to the grantee and "his heirs male" or "his heirs female" will pass the fee simple.

(2) A devise by an owner in fee simple to the devisee and "his heirs male" or "his heirs female," or to heirs "lawfully begotten," will pass an estate in fee tail male or fee tail female.

## PARAGRAPH (1).

"If a man give lands or tenements to another to have Authorities. and to hold to him and to his heires males, or to his heires females, he to whom such a gift is made, hath a fee simple, because it is not limited by the gift, of what bodie the issue male and female shall be, and so it cannot in any wise be taken by the equitie of the said statute (*De Donis Conditionalibus*) and therefore he hath a fee simple" (Litt. s. 31).

## PARAGRAPH (2).

"If a man by his last will devise lands or tenements to a man and to his heires male, this by construction of law is an estate taile, the law supplying these words (of his bodie), . . . A man seised in gavelkind gives or devises the same to a man and to his eldest heires. He cannot thereby alter the customary inheritance, but as in the case of our author, *ut res magis valeat*, the law rejecteth (*males*), so in this case the law rejecteth this adjective (*eldest*). And so if lands be given to a man and to the eldest heires females of his body, yet all the daughters shall inherit, as it hath been resolved" (Co. Litt. 27 a).

**Art. 42.**

Para. (2).  
 "Heirs  
 lawfully  
 begotten."

"The devisor has clearly used apt words for giving an estate tail by limiting the land to a man and his heirs lawfully begotten" (*per* Lord CAMPBELL, *Good v. Good* (1857), 7 El. & Bl. 295, at p. 300).

The words "lawfully begotten" may be, as Lord CAMPBELL says, "apt words" to give an estate tail in a will, but it is submitted that they are not apt words for this purpose in a deed, since they fail to disclose of whose body the heirs are to be lawfully begotten. To be heirs at all, whether of the grantee's body or not, they must be lawfully begotten, and it is not clear, therefore, how, even in a will, such words can confine the expression "heirs" to heirs of the body.

ART. 43.—*Effect of Gifts over on Failure of Issue.*

(1) A grant of realty to a grantee and his heirs, followed by a gift over on failure of the issue of the grantee, passes an estate in fee simple absolute.

(2) A devise to a devisee and his heirs, or to a devisee generally, followed by a gift over on failure of the issue of the grantee, passes an estate in fee simple subject to an executory devise over on the devisee's death without leaving issue him surviving, unless a contrary intention appear by the will.

(3) A bequest to a legatee "absolutely" or generally, followed by a similar gift over, passes the absolute interest subject to an executory bequest over in the same event. The same rule appears to apply to a grant of personalty by way of trust.

(4) A devise to a devisee and his heirs or to a devisee generally, followed by a gift over on failure of heirs,

passes an unconditional fee simple if the gift over is to a person who is a stranger in blood of the devisee, but only a fee tail if he is a possible heir of the devisee. **Art. 43.**

“ In any devise or bequest of real or personal estate, the words ‘die without issue,’ or ‘die without leaving issue,’ or ‘have no issue,’ or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise . . . .” (1 Viet. c. 26, s. 29). Section 29,  
Wills Act.

#### PARAGRAPH (1).

It cannot be said that the rule as the effect of a grant by deed in fee simple, with a gift over on the death of the grantee without issue, is absolutely settled. In *Morgan v. Morgan* (1870), 10 Eq. 99, Lord ROMILLY, where the words were, “without issue,” held that only a fee tail passed. In *Idle v. Cook* (1705), 1 P. Wms. 70, where the words were “for default of such issue,” the court held that a fee simple passed. And in *Olivant v. Wright* (1878), 9 Ch. D. 646, where the words were, “without leaving issue,” BACON, V.-C., held also that a fee simple passed. In the last-mentioned case the learned judge, in order to distinguish his decision from that in *Morgan v. Morgan*, *supra*, relied upon the difference in the words, “without issue” and “without leaving issue”—a somewhat attenuated distinction. But he did not for a moment conceal his opinion that the decision in *Morgan v. Morgan* was wrong (*Ibid.*, at p. 651). Rule applicable in grants of realty.

**Art. 43.**

Para. (1).

It is doubtful if the court would now rely on such verbal distinctions as those between the above three cases. In all probability it would follow the principle of the decision in *Olivant v. Wright*, and hold that what is limited expressly as a fee simple cannot be turned into a fee tail by a gift over on failure of the grantee's issue. The more probably would this course be adopted from the fact that, in the words of BACON, V.-C. (*Olivant v. Wright, supra*, at p. 650), the "cases in which there have been under the consideration of the court, deeds, or something equivalent to deeds, do not seem to me to favour the construction" of cutting down the fee simple expressly granted. The cases and dicta relied on to support that construction will generally appear to be cases not of a gift over on failure of issue, but of an estate in fee being set out in the premises of a deed of grant, and an estate in tail in the *habendum*. Thus, the passage often cited from Co. Litt. 21 a, is clearly that: "If lands be given to B. and his heires to have and to hold to B. and his heires *if B. have heires of the bodie*, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor." Surely the limitation here in the *habendum* is merely a limitation in unnecessary detail of an estate tail, and has no bearing on the case of a fee simple expressly granted with a gift over on failure of issue.

As to personalty, see *Evel v. Wallace* (1751), 2 Ves. sen. 318.

## PARAGRAPHS (2) and (3).

Before the Wills Act, 1837, a devise or bequest of an absolute interest, followed by a gift over on the devisee or legatee dying "without issue" (*Barlow v. Salter* (1810), 17 Ves. 479), "or without leaving issue" (*Cole v. Goble* (1853), 13 C. B. 445), was construed as a gift over on failure of issue *at any time* however remote unless there

was something in the will to show at what time the contemplated failure of issue was to take place. Accordingly, in the case of a devise, a fee tail passed to the devisee, and in the case of a bequest, as there could subsist nothing like an estate tail in personalty, the absolute interest passed to the legatee. An exception occurred in the case of an absolute bequest followed by a gift over "without leaving issue." This was interpreted by the court as meaning "without leaving issue at the death of the legatee," or proximate failure of issue (*Forth v. Chapman* (1719), 1 P. Wms. 663, Tud. Ld. Cas. in Conveyancing, p. 371), and the court was not dissuaded from holding this view, though in the same will it held that the same words, when applied to realty, meant an ultimate failure of issue (*ibid.*). The Wills Act, however, extended the rule that a proximate failure of issue was intended to all cases where a gift over, whether of realty or personalty, was made on the failure of the donee's issue, unless a contrary intention appears from the will (*Greenway v. Greenway* (1860), 2 De G. F. & J. 128).

Section 29 applies only to "die without issue," or "die without leaving issue," or "leave no issue," or any other words which may import either a want or failure of issue of any person "in his lifetime or at the time of his death or an indefinite failure of issue." It therefore has no application to such phrases as "issue dying under the age of twenty-one," which cannot import an indefinite failure of issue (*Morris v. Morris* (1853), 17 Beav. 198). Neither does it apply to expressions other than "issue," such as "heirs of the body" (*Darson v. Small* (1874), 9 Ch. 651); but apparently it does apply to such expressions as "issue male," although in a will these are usually read as precisely equivalent to heirs male of the body (*Upton v. Hardman* (1874), Ir. R. 9 Eq. 157; followed in *Re Edwards, Edwards v. Edwards*, [1894] 3 Ch. 644).

In *Re Booth, Pickard v. Booth*, [1900] 1 Ch. 768, a testator left freehold lands to H. for her own absolute use children.

**Art. 43.**

Para. (2), (3).

**Art. 43.** . . . but should she die without child or children," then over := *Held*, that "without child or children" here meant not "without ever having had a child or children," but "without leaving a child or children living at her death," and that an estate in fee simple subject to an executory gift over passed to H.

Section 10,  
Convey-  
ancing Act,  
1882.

It is to be remembered that under s. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), where there is a fee simple with an executory limitation over on default or failure of issue, the executory limitation over becomes void as soon as any issue of the class on failure or default of which the limitation over is to take effect, attains the age of twenty-one years.

#### PARAGRAPH (4).

**Authority.** "But we are to remember, however, that although a devise over after a dying without heirs, is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail" (Ferne on Contingent Remainders, 10th ed., Vol. 1, p. 466).

**Illustrations.** Thus, in *In re Waugh, Waugh v. Cripps*, [1903] 1 Ch. 744, a testator devised freeholds, after a life estate, as to one moiety, "to A. and his heirs," and as to the other moiety to "B. and her heirs: if either the said A. or B. should die without an heir, their share is to go to the survivor's heir or heirs." A. and B. were brother and sister:—*Held*, that A. and B. took estates tail with cross remainders in fee simple.

# CHAPTER IV.

## GIFTS IN JOINT TENANCY AND TENANCY IN COMMON.

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### ART. 44.—*Gifts to several Donees without more Creates a Joint Tenancy.*

(1) Where realty or personalty is given by deed or will to several persons *nominatim*, or to a class of persons without more, then whether such persons are individuals or corporations, they will take as joint tenants; provided that if the gift is made by conveyance operating at common law, the interests of all the donees are limited to commence at the same time.

(2) This rule does not apply to gifts of freeholds to several corporations, or to corporations and individuals under instruments coming into operation before August 9th, 1899.

"(1) A body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created

Bodies  
Corporate  
(Joint  
Tenancy)  
Act, 1899.

**Art. 44.** a joint tenancy, they shall be entitled to the property as joint tenants.

~ Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

“(2) Where a body corporate is joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant” (62 & 63 Viet. c. 20, s. 1).

Formerly corporations could not take in joint tenancy.

Before the passing of the Bodies Corporate (Joint Tenancy) Act, 1899, when land was limited to corporations or to a corporation and an individual in terms which would, had they both been individuals, have made them joint tenants, they would take as tenants in common (Co. Litt. 189 b, 190 a). Apparently this rule did not apply to gifts of chattels real or personal (see Co. Litt. 190 a); but it is to be remembered that, as a rule, corporations *sole* cannot hold chattels personal (1 Bl. Com., p. 477). Coke confines the rule that corporations cannot take in joint tenancy, to corporations *sole*—at least all the instances of it which he gives are of corporations *sole* (Co. Litt. 189 b); but it is usually stated as applicable to corporations generally. The point is of little importance, since as between corporations and individuals joint tenancies or tenancies in common are very rare, and as between corporations the question of survivorship could rarely arise.

Husband and wife.

Before the passing of the Married Women's Property Act, 1882 (45 & 46 Viet. c. 75), when freehold lands were limited to a husband and wife without more, they took not as joint tenants but as tenants by entireties. They now take as joint tenants (*Re March, Mander v. Harris* (1883), 24 Ch. D. 222), and a tenancy by entireties, if it can be created at all, must be created by express limitation

(*Re Jupp, Jupp v. Buckwell* (1888), 39 Ch. D. 148). The unity, however, of husband and wife is still recognised in law to this extent, that if property is granted to a husband and wife and a third person without more, the husband and wife take only one moiety between them (*Re Jupp, Jupp v. Buckwell, supra*).

Art. 44.

By s. 3 of the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), under a devise to the testator's heir, the heir is to take by purchase and not by descent. The effect of this is that when such heir is several co-heiresses, these take not as coparceners, but as joint tenants (*Owen v. Gibbons*, [1902] 1 Ch. 636).

The condition that the interests of the different donees must arise at the same time, applies only to common law conveyances; conveyances under the Statute of Uses, and devises and bequests are not affected by it (*M'Gregor v. M'Gregor* (1859), 1 De G. F. & J. 63).

The maxim is that equity leans against joint tenancy (*York v. Stone* (1707), 1 Salk. 158): and though that leaning is not so pronounced now as it once was, it has led to the establishment of doctrines which are still applicable in all their force, and which often make what is a joint tenancy at law a tenancy in common in equity.

Equity leans against tenancy.

The first of these doctrines is, that where there are "words of severance" there is no joint tenancy in equity. By words of severance is meant any indication that the donees were intended to take distinct interests. For instance, where a residue is left to a class in words which *prima facie* would create a joint tenancy, the addition of a power of advancement will be sufficient to make the class take as tenants in common (*L'Estrange v. L'Estrange*, [1902] 1 L. R. 467). This doctrine applies more particularly to gifts by will. Thus a gift by will to A., B., and C. "equally," or to the children of A. "share and share alike," or similar expressions, are sufficient to

No joint tenancy in equity where (1) There are words of severance.

**Art. 44.** make the gift a gift in tenancy in common. See *In re Yates, Bostock v. D'Eyncourt*, [1891] 3 Ch. 53. But while such words will be enough to create a tenancy among the persons intended primarily to take, it will not be extended to a class taking one such person's share by substitution. Thus, where the gift was "for all and every my sons and daughters who shall be then living, and the issue of any then dead (such issue standing *in loco parentis*) share and share alike," it was held, that while the surviving sons and daughter took among themselves as tenants in common, the issue of a deceased son or daughter took their parent's share as joint tenants (*In re Yates, Bostock v. D'Eyncourt, supra*, disapproving *Shepherdson v. Dale* (1866), 12 Jur. (n.s.) 156). And in the same way words of severance may apply to the remainder, but not to the life estate. Thus, on a gift in trust for A., B., and C., and their respective heirs, executors, administrators, and assigns, the court held, following *Ex parte Tanner* (1855), 20 Beav. 374, somewhat reluctantly, that A., B., and C., took a joint life estate and with remainders in common (*In re Atkinson, Wilson v. Atkinson*, [1892] 3 Ch. 52).

(2) Purchase money is advanced unequally by joint purchasers.

A second occasion when equity will hold that a tenancy in common is created where in law there is a joint tenancy, is in the case of purchasers for value who take a conveyance in their joint names, but do not advance the purchase-money from a joint account, but separately and in different proportions. Equity will here, in the absence of anything to the contrary in the conveyance or surrounding circumstances, hold that the purchasers are tenants in common in equity, and hold shares in proportion to the part of the purchase-money advanced by each (*Robinson v. Preston* (1858), 4 K. & J. 505). It would seem, too, that even when the purchase-money has been advanced in equal shares by the joint purchasers, though, *prima facie*, the tenancy is joint both in law and equity (*Lake v. Craddock* (1732), 3 P. Wms. 158), nevertheless evidence of surround-

ing circumstances will be admitted to show that a tenancy in common must have been intended (*Edwards v. Fashion* (1712), Prec. Ch. 332; *Robinson v. Preston* (1858), 4 K. & J. 505). **Art. 44.**

A third occasion when equity will hold that a tenancy in common is created where in law there is a joint tenancy, is in the case of a mortgage. Here, whether the mortgage money is advanced in equal or unequal proportions *primi facie* the mortgagees are tenants in common in equity (*Rigden v. Vallier* (1751), 2 Ves. sen. 252, at p. 258). Where it is desired that the mortgagees should take as joint tenants in equity—as where they are trustees—the mortgage should recite that the money is advanced on joint account; but even where there is such a recital, if it turns out to be erroneous, the mortgage will be held in tenancy in common (*In re Jackson, Smith v. Sibthorpe* (1887), 34 Ch. D. 732).

By s. 61 of the Conveyancing Act, 1881, where on a mortgage or obligation to pay money, the sum advanced or owing is expressed to be money belonging to the persons by whom it is advanced or to whom it is owing on joint account then unless the contrary is expressed in the mortgage or obligation, the receipt in writing of those surviving or the personal representatives of the last surviving will be a complete discharge notwithstanding any notice to the payer of a severance of the joint account.

A fourth occasion when equity will hold that a tenancy in common is created where in law there is a joint tenancy, is in the case of land that is used for the purposes of trade. At common law the maxim *jus accrescendi inter mercatores pro beneficio commercii locum non habet* always applied as far as pure personalty was concerned (Co. Litt. 182 a). But equity extended this rule to land also (*Jaffreys v. Smart* (1683), 1 Vern. 217). To make the rule apply, however, the land must not merely be purchased with partnership profits, but must be actually used for business

(3) Joint mortgagee except mortgaged deed expressly declares to the contrary.

(4) Where land is used in trade.

**Art. 44.** — purposes (*The Bank of England Case* (1861), 3 De G. F. & J. 645), or the course of dealing with it must show that a tenancy in common was intended (*Jackson v. Jackson* (1804), 9 Ves. 591).

**ART. 45.**—*Gifts to two Classes, or to an Individual and Class, in Tenancy in Common.*

Under a gift in common to A. and the children of B. as a class (which *primâ facie* they are not) or a gift to the children of A. and of B. as a class (which *primâ facie* they are), the children will take *per capita* and not *per stirpes*.

The dictum of ROMER, L.J., in *Re Moss, Kingsbury v. Walter*, [1899] 2 Ch. 314, at p. 319, that a gift to a class properly so called and a named individual, such as A., equally is *primâ facie* a gift to a class, was dissented from when the case went to the House of Lords, though the decision that in that particular case the named individual did take as a class was affirmed. See *supra*, p. 92.

~ The cases of *Barnes v. Patch* (1803), 8 Ves. 604, *Lady Lincoln v. Pelham* (1804), 10 Ves. 166, and *Rickabe v. Garwood* (1845), 8 Beav. 579, decide that a fund is to be distributed *per capita* and not *per stirpes*, when it is directed to be paid on a particular event, in such cases as the following, namely : where a fund is to be divided between the families of my brother L. and my sister E. ; where one-fourth of a residue is to be paid to the younger children of N., and one other fourth part to or among the younger children of S. ; where a legacy is to be paid between or amongst the children of P. and the children of R. In all these instances the court has

determined that the distribution is *per capita* and not *per stirpes*" (*Abrey v. Newman* (1852), 16 Beav. 431, at p. 433).

Art. 45.

"A bequest to the younger children of A. and the younger children of B. means the same exactly as a bequest to the younger children of A. and B." (*per* Lord ELDON, C., in *Lady Lincoln v. Pelham* (1804), 10 Ves. 166, at p. 175).

As an illustration of the second part of the rule, *In re Stone, Baker v. Stone*, [1895] 2 Ch. 196, is in point. There, a testator gave real and personal estate to his wife for her life, and directed that after her death the income should be equally divided between the testator's brother and sister. "At the decease of either of my before named brother and sister, the interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, etc. and to be equally divided between the children of the aforesaid share and share alike." STIRLING, J., following *Brett v. Horton* (1841), 4 Beav. 239, *held*, that on the decease of brother and sister, their children took the fund *per stirpes*; but the Court of Appeal reversed his decision, and held that they took *per capita*: LINDLEY, L.J. (at p. 200), after reading the words of the bequest to the children, said: "Why are we to take this to mean that the distribution is to be *per stirpes*? The obvious meaning of the words is, that the division is to be *per capita* and the language is not open to ambiguity. But it is said that the language must be controlled, because so long as there is a brother or sister living, the division of the income is *per stirpes*. But there is no sufficient indication of an intention that the capital should ultimately be divided in the same way. . . . I do not enter into an examination of the cases; when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."

Example of  
a gift to two  
families.

**Art. 45.**

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Indications  
of contrary  
intention.

Of course, if there is a sufficient indication that the children were intended to take *per stirpes*, they will take *per stirpes*. It is impossible to lay down any rule as to what the court will consider a sufficient indication of such an intention, and previous decisions are of little value as a guide in interpreting subsequent wills, as the judgment of LINDLEY, L.J., just cited, shows. As examples of these decisions, see *Davis v. Bennett* (1862), 4 D. F. & J. 327 ; *In re Orton's Trust* (1866), 3 Eq. 375 ; *In re Campbell's Trusts* (1886), 31 Ch. D. 685.

## CHAPTER V.

## ESTATES TAKEN BY TRUSTEES.

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46. <i>Cases in which the trustee takes any estate</i> - - -	239
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ART. 46.—*Cases in which the Trustee takes any Estate.*

(1) Where the trust is a simple trust, and the trust property is of freehold tenure, then, in consequence of (or in the case of wills by analogy to) the Statute of Uses, the trustee takes no estate unless the property be limited to his use, or unless there be a clear intention to vest an estate in him. But where the trust is a special trust, the statute does not apply, and the trustee will take a legal estate of some duration.

(2) Where the trust property is of copyhold or leasehold tenure, or is pure personalty, the Statute of Uses is inapplicable, and the trustee takes the legal estate, whether the trust be simple or special.

(3) This article has no application where the legal estate is outstanding; and with regard to wills of freeholds coming into operation since 1897 must be read in connection with s. 1 of the Land Transfer Act, 1897, which vests them in the personal representatives who are usually the same persons as the trustees.

## PARAGRAPH (1).

Thus, where the legal estate in freehold is limited to trustees, and the words used are, "in trust to pay to" a

Trust to  
permit bene-  
ficiary to  
receive rents.

**Art. 46.**

Para. (1).

specified person the rents and profits, there the trustees take the legal estate, because they must receive before they can make the required payments. But where the words are, "in trust to permit and suffer A. B. to take the rents and profits," there the use is divested out of them and executed in the party beneficially entitled, the purposes not requiring that the legal estate should remain in the trustees (*per* PARKE, J.: *Barker v. Greenwood* (1839), 4 M. & W. 429 : *Doe d. Leicester v. Biggs* (1808), 2 Taunt. 109 : *Doe v. Bolton* (1839), 11 A. & E. 188).

Trust to permit beneficiary to receive *net* rents.

Where, however, the trustees are to permit and suffer the beneficiary to receive the *net* or clear rents and profits, the trustees take the legal estate ; it being presumed that the trustees are to take the *gross* rents, and after payment of outgoings, to hand over the *net* rents to the beneficiary (*Barker v. Greenwood, supra* ; *White v. Parker* (1835), 1 Bing. N. C. 573 : *Shapland v. Smith* (1780), 1 Bro. C. C. 75).

Trust to pay or permit beneficiary to receive rents.

Where the language is ambiguous, and may be read either as implying a simple or a special trust, it has been said that the question must be determined according to the general rules of construction. Thus, in *Doe v. Biggs, supra* (and see *Baker v. White* (1875), 20 Eq. 166, 171), it was decided that the words "to pay or permit him to receive" would, if contained in a deed, create a special trust, inasmuch as of two inconsistent expressions in a deed the first prevails ; whereas the same words occurring in a will would create a simple trust, as a testator's last words are preferred (see *supra*, p. 53). However, this case cannot be relied on. As LINDLEY, L.J., said, in *Re Lashmar, Moody v. Penfold*, [1891] 1 Ch. 258, "*Doe v. Biggs* is one of those cases which may be classed as anomalies, and it is so known to and understood by conveyancers and real property lawyers, who take care to draw instruments accordingly. I do not think it is a sensible decision. I do not think that case could be possibly so decided now if the question arose for the first time ; and I

am not disposed to extend it. On the other hand, I do do not wish to shake titles ; and I shall do what our predecessors have always done—leave the case where it is.” BOWEN, L.J., went even further, saying, “I agree with the late MASTER OF THE ROLLS that the case is not one the precedent of which is really applicable to other cases. In most cases there is sure to be a context which displaces the conclusion at which the court arrived in that instance.”

Art. 46.

Para. (1).

So, again, where the trustees are to exercise any control or discretion, they take some estate. For instance, where the beneficiary is empowered to give receipts for the rents with the *approbation* of the trustees (*Gregory v. Henderson* (1813), 4 Taunt. 772 ; and see also *Davies to Jones and Evans* (1883), 24 Ch. D. 190, where a legal estate was implied without any devise to the trustees, but *cf.* *Re Cameron, Nixon v. Cameron* (1884), 26 Ch. D. 19), or the trust is for the separate use of a married woman who consequently requires protection, the trustees take the legal estate (*Harton v. Harton* (1798), 7 T. R. 652 ; but *quære*, whether this would be so since the Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75) ) ; at all events where the trust is created by will. But where it is created by deed, it would seem that the common law courts, not recognising the separate estate of a *feme covert*, would (at all events before the Judicature Act, 1873 (36 & 37 Vict. c. 66) ) have held that such a trust was a simple trust, and therefore came within the Statute of Uses (*Williams v. Waters* (1845) 14 M. & W. 166 ; and see *Nash v. Ash* (1862), 1 H. & C. 167 ).

Where the property is devised to trustees charged with payment of debts, and subject thereto in trust for A., there, as the trustees are not directed to *pay* the debts, they have no duties, and consequently take no estate (*Kenrick v. Lord Beaucherk* (1802), 3 B. & P. 175). But it would be otherwise if they had to pay them (*Smith v. Smith* (1861), 41 C. B. (S.S.) 121 ; *Marshall v. Giggell*

Charge of debts.

**Art. 46.** (1882), 21 Ch. D. 790 ; and see as to what amounts to a direction *to the trustees* to pay debts, *Spence v. Spence* (1862), 10 W. R. 605 ; *Creton v. Creton* (1856), 3 Sm. & G. 386 ; and *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43).

Freeholds  
and copy-  
holds in one  
trust.

In *Houston v. Hughes* (1827), 6 B. & C. 403, it was held that (notwithstanding the Statute of Uses) under a devise of freeholds and copyholds to A. and his heirs in trust for B. and his heirs, the circumstance that A. took an estate in the copyholds was an argument in favour of an intention that he should take the legal estate in the freeholds. However, this doctrine was dissented from by JESSEL, M.R., in *Baker v. White* (1875), L. R. 20 Eq. 166, and it is clear that even if it could be supported in the case of a will, a similar limitation in a deed would be construed far more strictly.

Devise to  
the use of  
trustees.

So where the lands are devised unto or *to the use of* trustees in trust for B., the trustees take the legal estate, irrespective of any active trust (*Doe v. Field* (1831), 2 B. & Ad. 564).

Trust to  
convey to  
beneficiary.

Again, even where the active trust is of a trivial description, yet if it implies an intention to vest the legal estate in the trustee, it is apprehended that, notwithstanding the Statute of Uses, effect will be given to that intention. Thus, if a testator devises Greenacre to A. and B. and their heirs upon trust to convey and assure the same to C. in fee, A. and B. will take the legal estate, for they have an active duty to perform, viz., to convey it to C. (*Doe d. Shelley v. Edlin* (1836), 4 A. & E. 582 ; *Doe d. Noble v. Bolton* (1839), 11 A. & E. 188 ; *Van Grutten v. Foxwell*, [1897] A. C. 658).

Power of  
sale given to  
trustees.

A devise to trustees upon trust for A. for life, with remainder to B. in fee, followed by a *power* to sell, lease, or mortgage, vests the legal estate in the trustees, for the exercise of the power might become an active duty and

could not be carried out unless the trustees were able to convey the estate (*Watson v. Pearson* (1848), 2 Exch. 581; *Doe d. Cadogan v. Ewart* (1838), 7 A. & E. 636). But it is apprehended that if such a power were followed by an express power to revoke uses and appoint a new one in favour of the purchaser, the trustees would then take no legal estate. For such a power would not only render the ownership of the legal estate by the trustees unnecessary, but would also show that the testator had no intention of vesting the legal estate in them; otherwise the power of revocation and new appointment would be futile.

**Art. 46.**

Para. (1).

**ART. 47.**—*The quantity of Estate taken by the Trustee of Lands.*

Whenever, under the preceding article, a trustee takes a legal estate in land, the quantity of that estate is determined by the following principles :

- (1) If the settlement is a deed, it will be construed strictly, and the estate of the trustee will not be enlarged or diminished by any reference to the exact estate required to carry out the trust. But where there is a limitation in fee to a trustee for purposes which are confined to the life of a beneficiary, followed by a limitation to the same trustee for a term of years, the fee will be cut down to an estate *pur autre vie*, by reason of the inconsistency.
- (2) If the settlement is a will executed since the Wills Act, an indefinite devise to a trustee *primâ facie* passes the fee simple, or other

Art. 47.  

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the whole estate of the testator; and if the trusts by their nature extend over an indefinite period, that presumption is irrebutable. But if, on the face of the will, it is apparent that an estate *pur autre vie* would certainly enable the trustee to fulfil all the trusts, he will take that estate only, notwithstanding a limitation to him and his heirs, unless there is a clear intention expressed that he shall take the fee or some other defined estate.

## PARAGRAPH (1).

Gift by deed  
to trustees  
and their  
heirs.

In *Colmore v. Tyndall* (1828), 2 Y. & J. 605, under a deed, lands were limited to the use of A. for life, and after his death to the use of B. and his heirs during the life of A., to support contingent remainders, remainder to the use of C. for life, remainder to the same B. and his heirs during the life of C. to support contingent remainders, remainder to the first and other sons of C. in tail male, remainder to divers other uses, remainder to the said B. and his heirs (without saying during the life of the tenant for life) to support and preserve contingent remainders with divers limitations over. The question arose whether, under the last limitation to B. and his heirs, he took the fee simple, or whether he only took that which was necessary for the purpose of the trust, namely, an estate *pur autre vie*. But the court held that it was not a sufficient ground for restricting an estate limited by deed to a trustee *and his heirs* to an estate for life, that the estate given to the trustee seemed to be larger than was essential to its purpose. And the LORD CHIEF BARON, quoting from the judgment of WILLES, L.C.J., in *Parkhurst v. Smith* (1741), Willes's Rep. 327, at p. 332, said: "Though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we

put words in a deed which are not there, nor put a construction on words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest and the words doubtful and obscure, it is the duty of the judges to endeavour to find out such a meaning in the words as will best answer the intent of the parties. . . .

As to the notion that whenever an estate is limited to a person professedly a trustee he shall, whatever terms may be used, take only the estate requisite to enable him to perform his trust, and this though of a freehold and in a deed, I do not find it supported by any authority, nor even by any dictum." And see also *Cooper v. Kyrock* (1872), 7 Ch. App. 398; and *Re White and Hindle* (1878), 7 Ch. D. 201.

**Art. 47.**

Para. (1).

But even in a deed, where there are limitations which, on a strict construction, would be inconsistent and repugnant, the court will, by supplying obviously omitted words, endeavour to carry out the intention. Thus, in *Curtis v. Price* (1805), 12 Ves. 89, the facts were as follows: A deed of settlement purported to convey freeholds to P. and J. and their heirs to the use of M. for life, remainder to the use of E. (the wife) during widowhood, and if she should marry again, to the use of P. and J. and their heirs, in trust out of the rents to pay E. an annuity, and to apply the residue to the maintenance of the children of M. and E.; with remainder, after the decease of the survivor of M. and E. *to the use of P. and J. for 1000 years*, upon divers trusts. It was held that, as the limitation of the 1000 years term to P. and J. was absolutely inconsistent with an intention to give them the fee, the limitation to them and their heirs must be cut down to an estate during the life of E. And see *Beaumont v. Mayor of Salisbury* (1854), 19 Beav. 198.

Inconsistent limitations.

If the limitations stated in the first illustration had been declared by a will instead of a deed, the decision would clearly have been different. Thus, if lands are devised to

Gift by will to trustees and then heirs.

**Art. 47.**

Para. (1).

trustees and their heirs, upon trust to pay the *net* rents to A. for life, and after A.'s death in trust for B., the trustees, notwithstanding the words of inheritance, only take an estate *pur autre vie* (viz., during A.'s life) ; for the active trust reposed in them ends with the life of A., and consequently the purposes of their trust do not require them to take a larger estate (*Blaggrave v. Blaggrave* (1850), 4 Ex. 550 ; *Watson v. Pearson* (1848), 2 Ex. 581 ; *Doe v. Cafe* (1852), 7 Ex. 675).

Larger estate  
not implied  
to rectify  
testator's  
mistake.

Nor will the court imply a larger estate (where it is not necessary to carry out the definite trusts of the will) on the ground that by doing so effect would incidentally be given to the testator's intentions. Thus, if freeholds be given to A. for life, with remainder to trustees and their heirs, in trust to preserve contingent remainders, with remainder to the heirs of A., it is obvious that if the trustees could be held to take the fee in reversion expectant on A.'s life estate, the rule in *Shelley's Case*, *supra*, p. 210, would be rendered inapplicable, and the obvious intention of the testator to give A. a mere life interest would be preserved. But notwithstanding this, the court holds that the trustees only take an estate *pur autre vie*, that being sufficient to enable them to preserve contingent remainders, which alone was the subject of the trust reposed in them (*Nash v. Coates* (1832), 3 B. & Ad. 839 ; *Haddesley v. Adams* (1856), 22 Beav. 266).

Estate in  
trustee to  
preserve  
contingent  
remainders.

On similar grounds, the court will not imply a larger estate in the trustees than the trust requires, merely because, if they took such larger estate, it would support a contingent remainder, and so prevent it from failing for want of a particular estate of freehold (*Cunliffe v. Brancker* (1876), 3 Ch. D. 393 ; *Festing v. Allen* (1843), 12 M. & W. 279 ; *Marshall v. Gingell* (1882), 21 Ch. D. 790).

Direction to  
pay rents to  
married  
woman.

On the other hand, where, by will, the rents of certain lands (which are not expressly devised to anyone ; see *supra*, p. 131) are directed to be paid to a married woman's separate use, by the testator's executors, there is

an implied devise to the executors of such an estate in the land as will enable them to execute the trust, viz., an estate *pur autre vie* (*Bush v. Allen* (1696), 5 Mod. 63). **Art. 47.**  
Para. (1).

So if land be devised to trustees without any words of limitation, and they are expressly directed to sell (*Cropton v. Davies* (1869), L. R. 4 C. P. 159), or impliedly authorised to do so (*Gibson v. Lord Montfort* (1750), 1 Ves. sen. 485), as by a direction to pay debts (*Marshall v. Gingell, supra*; *Creton v. Creton* (1856), 3 Sm. & Giff. 386; *In re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; but see *Carlyon v. Truscott* (1875), 20 Eq. 348) whether certainly or contingently, or are authorised to lease, or to mortgage (*Re Eddels* (1871), 11 Eq. 559), or to allow maintenance to infants during a period of suspended vesting (*Re Tanqueray-Willaume and Landau* (1883), 20 Ch. D. 465), or to do any other act which requires the complete control over the property (*Villiers v. Villiers* (1740), 2 Atk. 72), the trustees will take an estate in fee simple or other the whole estate which the testator could dispose of. And see *Re Adam's and Perry's Contract*, [1899] 1 Ch. 554. Trusts requiring a fee simple imply that estate.

And so, too, trustees will take a fee simple where there is a clear intention to give it them, notwithstanding that a less estate would certainly enable them to perform the trust. Thus, if lands be devised unto and to the use of A. and his heirs, in trust for B. and his heirs, A. takes the legal estate (*Doe v. Field* (1831), 2 B. & A. 564), because there can be no other meaning given to the words used. But a devise unto and to the use of A. and his heirs, in trust for A. for life, and after A.'s death a direct devise to C., gives the trustees merely an estate during the life of A. (*Doe d. Woodcock v. Barthropp* (1814), 5 Taunt. 382), for the remainder is not limited by way of trust (but compare *Creton v. Creton, supra*). Clear intention to vest fee, although not required for the trust.

As another instance of the effect which will be given to a clear expression of intention, may be mentioned the case Trust to convey to another

**Art. 47.**

Para. (1).

where a testator devises property to trustees and their heirs upon trust to pay the net rents to A. for life and after his death upon trust to convey the property to B. in fee simple. The direction to convey constitutes an active trust, which necessarily implies that the trustees have the legal fee in them; for *non dat qui non habet* (*Doe v. Noble v. Bolton* (1839), 11 A. & E. 188).

Recurring  
trust.

And where there are recurring trusts which require the legal estate to be in the trustees with intervening limitations, which, taken alone, would vest the legal estate in the persons beneficially entitled, and there is *no repetition before each of the recurring trusts* of the gift of the legal estate to the trustees, the legal estate is held to be in the trustees throughout, and the intermediate estates are equitable and not legal. To show the importance of this principle, it is well to refer to the leading case of *Harton v. Harton* (1798), 7 T. R. 652. There the limitations were to trustees in trust for A. for life for her separate use; remainder to the heirs of her body; remainder to B. for life for her separate use, with remainder to the heirs of her body. Here the separate use gave the trustees an estate during A.'s life, and also during B.'s life; but had it not been for this last trust, they would not have taken the legal estate during the intermediate trust in favour of the heirs of A.'s body. As, however, there was a recurring trust, they did so; and, therefore, as the estate of A. and the estate given to the heirs of her body were both equitable estates, the rule in *Shelley's Case* applied, and A. took an estate tail. *Harton v. Harton* has been followed by the House of Lords in the recent case of *Van Grutten v. Forwell*, [1897] A. C. 658, where precisely the same point arose.

What are  
recurring  
trusts.

It is important to remember, however, that by a recurring trust is here meant a trust which necessitates the legal estate being in the trustees before as well as after

the intermediate limitations. The fact that the legal estate must be in the trustees, say at the death of the life tenant, will not, if it is not necessary it should be in them during the life tenancy, make the estate of the life tenant equitable (*Re Adam's and Perry's Contract*, [1899] 1 Ch. 554).

**Art. 47.**

Para. (1).

See *Collier v. Walters* (1873), 17 Eq. 252, as to trusts of indefinite duration arising under wills executed before the Wills Act.

### PARAGRAPH (2).

Paragraph (2) of this Article is intended and believed to give the effect of ss. 30 and 31 of the Wills Act (1 Vict. c. 26). By the first of these sections it is enacted that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall be given to him expressly or by implication. Section 31 enacts that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof, shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will and not an estate determinable when the purposes of the trust shall be satisfied.

Both these sections have been subjected to much criticism, and strange and almost incredible as it may

- Art. 47.** appear, it is believed that the real history of the two  
sections is that they were drafted as alternative sections,  
**Para. (2).** but, by some carelessness, were both allowed to remain in  
the Act when passed. See *per* JESSEL, M.R. : *Freme v.*  
*Clement* (1881), 18 Ch. D. 514. Their meaning is by  
no means clear ; but it is apprehended that their effect is  
as above stated.
-

## PART V.

### CONDITIONAL INTERESTS UNDER WILLS AND SETTLEMENTS.

CHAP.	PAGE
I.— <i>Principles of law relating to absolute and conditional interests</i> - - - - -	251
II.— <i>Principles for determining whether an interest is vested or contingent where enjoyment is postponed</i> - - - - -	258
III.— <i>Principles relating to the divesting of vested interests</i> - - - - -	281
IV.— <i>Secondary rules relating to conditional gifts, viz., gifts to survivors, alternative gifts, gifts over on death spoken of as a contingency, and gifts subject to conditions imposed on erroneous assumptions</i> - - - - -	301
V.— <i>Principles relating to the intermediate income of conditional gifts</i> - - - - -	323

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## CHAPTER I.

### PRINCIPLES OF LAW RELATING TO ABSOLUTE AND CONDITIONAL INTERESTS.

ART.	PAGE
48. <i>All beneficial interests in property are either contingent, indefeasibly vested or vested subject to be divested absolute or conditional</i> - - - - -	251

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*ART. 48.—All Beneficial Interests in Property are either Absolute or Conditional.*

BENEFICIAL interests in property under wills and settlements are either indefeasibly vested, or conditional.

**Art. 48.**  

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(1) An interest is indefeasibly vested when, although actual enjoyment may be postponed, the donee has acquired a proprietary right to it which is not subject to any condition, either precedent or subsequent. Unless, therefore, the interest is restricted to the life of the donee it is transmissible on his death.

(2) An interest is conditional when it is either contingent, or vested subject to be divested.

(a) A contingent interest is one in which the donee takes no proprietary interest at all, unless and until some specified event happens. Such a condition is called a condition precedent. A contingent interest is only transmissible on the death of the donee when the condition is not personal to him, and is capable of being performed by his sequels in title.

(b) An interest is vested subject to be divested when there is no condition precedent to vesting, but the interest is to be taken away from the donee in certain events and given to another. Such a condition is called a condition subsequent. An interest vested subject to be divested is transmissible on the death of the donee, unless the divesting condition takes effect.

(3) When a condition is illegal or impossible of performance otherwise than by reason of the acts or defaults of the donee, then if it is a condition precedent the gift is altogether void; but if it is a condition sub-

sequent, the first gift is indefeasible, and only the gift over void. **Art. 48.**

The above principles are principles of law, and not rules of interpretation. It has nevertheless been considered expedient to state them shortly here (1) because otherwise the great importance of the question as to whether a gift is vested, contingent, or vested subject to be divested might be missed; and (2) because these principles of law not infrequently cause a testator's intention to be frustrated. For whatever he may have intended to do, the law cannot give effect to his intentions if on the true interpretation of his language he has chosen an inappropriate form of condition.

#### PARAGRAPH (1).

A testator gives property to his son A. for life, and after A.'s death to B. absolutely. Here B.'s interest is vested, although his enjoyment is postponed during A.'s life. If, therefore, B. should die before A., the property is transmitted to his (B.'s) representatives, as part of his estate. Example of interest vested, although enjoyment postponed.

With regard to *legal* remainders in real estate, a person may have a "vested remainder," although that estate or interest *may never* become capable of being enjoyed in possession either by him or his sequels in title. Thus, if A. conveys property to B. and the heirs of his body, with remainder to C. in fee simple, C. will take a vested remainder, although his actual enjoyment is conditional upon failure of B.'s issue, which may never take place. Moreover, his vested remainder may be barred altogether by a disentailing assurance. Nevertheless, as he has an actual estate in fee simple subject to a prior estate tail, he is said to have a vested estate in the land unless and

**Art. 48.**

Para. (1).

until his estate is barred. Although he may find it a barren property, it *is* his property, and he, and no one else, is fee simple owner.

## PARAGRAPH (2) (a).

Example of  
contingent  
interest.

A testator gives his property to his son A. *if* he attains twenty-one, or to *such of* a class as shall attain twenty-one. In both cases the gift is contingent; the attainment of twenty-one being a condition precedent to the legatee taking anything. Consequently, if A. dies under twenty-one, there is a lapse, and if any of the class die under twenty-one he falls out of the class altogether. Moreover, if A. should die before attaining twenty-one, his representatives would not only have no claim to the property itself, but not even to the intermediate income.

Infant's  
contingent  
interest in  
land does not  
fall within  
Settled Land  
Acts.

Again, under the Settled Lands Acts, the real estate of an infant who has a vested interest in possession either in fee or for life, can be sold or leased. But this cannot be done when the infant's interest is contingent, *e.g.*, on his attaining twenty-one (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84).

## PARAGRAPH (2) (b).

Infant's  
vested  
interest in  
land within  
Settled Land  
Acts although  
liable to be  
divested if he  
dies under  
twenty-one.

But where real estate is given to an infant in fee simple, subject to a gift over if he dies before attaining twenty-one, then as his interest is vested subject to be divested, the property can be leased or sold under ss. 58 (1) (ii), 59, 60, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38). Moreover, if he should die during infancy, his representatives would be entitled to the intermediate income, or so much of it as had not been applied for his maintenance.

Effect of  
contingent  
interest  
and interest  
vested subject  
to be divested  
compared.

Once more, take two gifts, (1) to A. if he shall survive B., and if not, then to his children; and (2) to A., but if he shall die before B., then to his children. The first is contingent, the second vested subject to be divested.

Consequently, if A. dies in B.'s lifetime without issue, the first gift would fail altogether, but the second would pass absolutely to his representatives, as the condition subsequent divesting his estate in favour of his children would have failed for want of issue (*Salisbury v. Pett* (1843), 3 Ha. 86).

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Para. (2) (b).

The principle upon which this proceeds is, that *a condition which is subsequent quâ the first taker is precedent quâ the second*; so that the latter gift never arises at all; and as a corollary, the divesting of the first gift never takes place unless the exact specified event happens.

As will be seen in Chapter III. this rule of law (that a divesting condition will only take effect if the specified events exactly happen) sometimes causes surprising results which no one supposes can have been contemplated by the testator. But being a rule of law, and not a rule of interpretation, the result is not so unreasonable as it sometimes appears to the lay mind. Thus, where there is a gift to one for life, and after his death to A., B. and C. in equal shares, "or to such of them as survive the life tenant"; then, if *none* of them survive the life tenant, their representatives will take the property in equal shares (*Browne v. Lord Kenyon* (1818), 3 Mad. 410; *Sturges v. Pearson* (1819), 4 *ib.* 411; *Belk v. Slack* (1836), 1 Ke. 238). For the gift over having failed for want of a survivor, the original gift to all three (being an interest vested subject to be divested and not merely contingent) remains undisturbed. But if, on the other hand, the gift had been to one for life, and after his death "to *such* of A., B. and C. as shall survive the life tenant," then, survivorship being a condition precedent, the gift would have lapsed.

## PARAGRAPH (3).

Another important distinction between conditions precedent and subsequent, arises where the condition is

Difference between illegal conditions precedent and subsequent.

**Art. 48.**

Para. (3).

illegal or impossible of performance (*a*). In such cases, if it is precedent, the gift fails altogether; but if it is subsequent, only the gift over fails; because, in that case, the condition is precedent *quā* the gift over. Thus, a bequest to A. if he shall within six months horsewhip X., is void altogether. Whereas, had it been worded as a gift to A., subject to a gift over to B. if A. should not horsewhip X. within six months, the gift to A. would have been absolute and indefeasible, and the gift over to B. void. In the first case there is no gift at all to A. unless he does an illegal act. In the second case there is nothing taken away from A. unless he does the act. In both cases the law forbids the act and will not allow anyone to take advantage of its performance.

Conditions subsequent distinguished from interests limited by way of succession.

In this connection, however, conditions subsequent must be carefully distinguished from interests limited by way of succession. Thus, it is quite lawful to give property, or the income of property, to a daughter *until she shall marry*, and then to give it to some one else; although it is unlawful to give it her for life or indefinitely, with a condition taking it away in the event of marriage, such a condition being general restraint of marriage. As WIGRAM, V.-C., said in *Morley v. Rennoldson* ((1843), 2 Ha. 570): “Until I heard the argument of this case, I had certainly understood that, without doubt, where property was limited to a person *until she married* and when she married then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case *there is nothing to give an interest beyond marriage*. If you suppose the case of a gift of a certain interest, *and that interest sought to be abridged by a condition*, you may strike out the condition and leave the

(*a*) See *Croskery v. Ritchie*, [1901] 1 I. R. 437; *Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 747, and compare them with *Horrigan v. Horrigan*, [1904] 1 I. R. 271, where the condition was precedent.

original gift in operation ; but if the gift is until marriage, there is nothing to carry the gift beyond the marriage.”

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Para. (3).

It must, however, be remembered that in the interpretation of wills the court may, on the whole instrument, construe that which at first sight seems a life estate with a gift over taking it away on marriage, to be substantially a gift *until* marriage and then over. See judgments of JAMES, L.J., in *Allen v. Jackson* (1875), 1 Ch. D., at p. 404, and of KNIGHT-BRUCE, L.J., in *Heath v. Lewis* (1853), 3 D. M. & G. 954 ; but *cf.* *Re Dugdale, Dugdale v. Dugdale*, [1888] 38 Ch. D. 176. As to gifts over in partial restraint of marriage, see *Re Whiting, Whiting v. de Rutzen*, [1905] 1 Ch. 96.

Lastly, the above rules of law often make it extremely important to ascertain whether on the true interpretation of a will the *intention* of the testator was to give his whole interest in property to the donee subject to a gift over on the happening of some event (most frequently death without issue), or whether he intended to give him a life estate only, with remainder to his children or others. In the first case the gift would be subject to the law of conditional gifts, and would remain absolute if the donee died leaving issue : in the second, there would be no condition at all, but merely a vested life estate given to the donee, with a vested gift in remainder to his children.

Importance of ascertaining whether an interest is given for life only or absolutely, subject to a divesting provision on death coupled with a contingency.

## CHAPTER II.

PRINCIPLES FOR DETERMINING WHETHER AN  
INTEREST IS VESTED OR CONTINGENT WHERE  
ENJOYMENT IS POSTPONED.

ART.	PAGE
49. <i>Vesting of personal estate, including the proceeds of real estate directed to be converted</i> - - - - -	258
50. <i>Vesting of real estate</i> - - - - -	271
51. <i>Vesting of legacies and portions charged on real estate</i> -	277
52. <i>Vesting of legacies and portions charged on mixed, real, and personal estate</i> - - - - -	280

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THERE is considerable difference between the rules relating to the vesting of (1) personal estate, including the proceeds of real estate, directed to be converted ; (2) real estate : and (3) portions or legacies charged on real estate. It is, therefore, necessary to consider these three subjects separately.

---

ART. 49.—*Vesting of Personal Estate, including the  
Proceeds of Real Estate directed to be converted.*

(1) Whether a gift to be enjoyed at a future date is vested or contingent, depends on the donor's intention ; and where there is no ambiguity, that intention must determine the question.

(2) Where, however, the instrument is silent as to vesting, or even where the word “vest” is used ambiguously :

(a) It is vested immediately on the donee coming into existence, or on the instrument coming

into operation (whichever last happens), if the enjoyment is postponed *merely* for the convenience of the estate or to allow of an intervening or other limited interest. **Art. 49.**

(b) But if the postponement of enjoyment is for reasons personal to the donee, the gift will be contingent.

(3) Where the language is ambiguous as to the reasons for postponement, the following facts tell in favour of vesting :

(a) The fact that the donor has made a distinction between the gift and the time of payment of it.

(b) The fact that the intermediate interest is given to the donee.

(c) The fact that a testator has directed the gift to be severed from his general estate, and held in trust, together with accumulations of income, for the legatee.

(d) The fact that the gift is a residuary bequest (so as to avoid an intestacy).

(e) The fact that after a gift to a class at a given age, the donor directs that the *shares of those dying under that age* shall go to the survivors.

(f) The fact that after a gift to children "as and when they shall attain" a given age, the donor makes a gift over on another contingency, as death under the given age *without issue (sed quare)*.

(4) If the enjoyment is postponed until the youngest member of a class shall attain a given age; then the

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reasons for postponement being partly for the convenience of the estate and partly personal to each donee, every member of the class will take a vested interest upon attaining the given age (subject to being partially divested to let in future born children), notwithstanding that he may die before the youngest attains the given age, or that the youngest child may fail to attain that age.

(5) Where there is a contingent gift to a class or individuals, and the issue of such of them as die before the contingency, the contingency is *prima facie* not extended to the issue.

(6) Where an ulterior gift is, in terms, to arise on the failure *in a particular event* of a prior limited interest which is to last only until the happening of any of several events, it will not be construed as contingent upon the determination of the prior interest in the manner mentioned, but will be vested and take effect in possession, although the mode in which the prior interest fails was not the one mentioned.

(7) The above rules may be negatived, either expressly or impliedly, by the context.

## PARAGRAPH (1).

Express  
direction as  
to "vesting."

As an example of express direction by the donor may be taken the common case where he directs that a donee shall take "a vested interest on attaining twenty-one." In such cases, the donee's interest is merely contingent until he attains the given age: for the direction is express and unambiguous, and, however inconvenient, the court must give effect to it (*Glancill v. Glancill* (1816), 2 Mer.

38 : *Re Thruston* (1849), 17 Sim. 21 ; *Re Thatcher* (1858), 26 Beav. 365 ; *Wakefield v. Dyott* (1858), 4 Jur. (N.S.) 1098). Art. 49.  
Para. (1).

So, again, where a testator gives property to A., but if he dies under twenty-one, then to B., the gift to B. is contingent on A. failing to attain twenty-one. Consequently, if A. attains twenty-one but dies in the testator's lifetime, so that there is a lapse, B. will not take ; for the condition precedent, viz., the failure of A. to attain twenty-one has not happened ( *Williams v. Chitty* (1797), 3 Ves. 545 ; *McCarthy v. McCarthy* (1879), 3 Ir. L. R. 317). But if A. died in the testator's lifetime, under twenty-one, then the contingency having happened B. will take ( *Humphreys v. Howes* (1830), 1 R. & M. 639 ; *Re Green's Estate* (1860), 1 Drew. & Sm. 68 ; *Rackham v. De la Mare* (1864), 2 De G. J. & S. 74). The same rule seems to apply where the first gift is to a class, even although it never comes into existence at all ( *Mackinnon v. Sewell* (1834), 2 My. & K. 202 ; *Brookman v. Smith* (1872), L. R. 6 Ex. 291 ; 7 C. 271 ; *Tarback v. Tarback* (1835), 4 L. J. Ch. 129 ; but *cf. Greated v. Greated* (1859), 26 Beav. 621).

#### PARAGRAPH (2) (a).

However, although the court is very loath to depart from the ordinary meaning of the technical word "vest" <sup>sometimes construed as</sup> *Re Arnold* (1863), 33 Beav. 163, 173 ; *Richardson v. Power* (1865), 19 C. B. (N.S.) 780, yet there may sometimes be a loophole of escape, viz., where (as not infrequently happens) it is *clear* from other parts of the instrument that the donor used the word "vest" in the sense of "vest *in possession*." In such cases the instrument becomes ambiguous, and the ordinary rules as to ascertaining the period of vesting will be applicable. Thus, where legacies are directed to be paid to such members of a class as shall be living at the death of a

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Para. (2) (a).

tenant for life, a subsequent direction that they are to *rest* at twenty-one will be construed to mean *rest in possession*, and will not give vested interests to those who attain twenty-one but predecease the tenant for life (*Williams v. Haythorne* (1871), 6 Ch. App. 782, 786); the reason being that reading the two directions together, it appears that the testator used the word “vested” in the sense of payable. The learned judge (Lord HATHERLEY) who decided that case, even went to the extent of saying that a child who survived the tenant for life took an immediate vested interest, which would be transmissible to his personal representatives in the event of his dying under twenty-one; but this was only a *dictum*, although it appears to be a logical corollary of the main decision. See also *Simpson v. Peach* (1874), 16 Eq. 208, and *Barnet v. Barnet* (1860), 29 Beav. 239, and *Darley v. Percival*, [1900] 1 I. R. 129).

“Vested”  
sometimes  
read as  
“indefeasibly  
vested.”

So, again, the word “vested” may, by the context, be construed as “indefeasibly vested” on the happening of a contingency, in which case the gift will be vested and transmissible before the event, subject only to being divested on the happening of it (*Taylor v. Frobisher* (1852), 5 De G. & S. 191). Thus, where there is a gift to a class of children, with a direction that no share shall be “paid to or become vested in” any child until it attains a given age, but that if any child dies under that age *leaving issue*, such issue shall take the share which its deceased parent *would have had if living*, the word “vested” is construed as indefeasibly vested, and each child takes an immediate vested and transmissible interest, notwithstanding it has not attained the prescribed age, subject only to that interest being divested in the event of its dying under the prescribed age *and leaving issue* (*Re Edmondson's Estate* (1868), 5 Eq. 389; *Poole v. Bott* (1853), 11 Ha. 33; and see *infra*, pp. 288 *et seq.*). In fact it would seem that wherever, in other parts of the instrument, the donor speaks of the donee's *share or*

legacy as belonging to him before the prescribed date, any direction as to *vesting* will be construed as importing absolute or indefeasible vesting, *i.e.*, a vesting free from the liability to a contingent gift over. See *Armstrong v. Wilkinson* (1878), 3 App. Cas. 355. In the last cited case, Sir Jas. COLVILLE said, "The authorities show that the word 'vest' may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is, at a specified time, to become absolute and indefeasible."

Art. 49.

Para. (2) (a).

But if so technical a word as "vest" can be explained *à fortiori* such ambiguous words as "become beneficially interested" will not even *primâ facie* postpone vesting (*M'Lachlan v. Taitt* (1860), 2 D. F. & J. 449).

Ambiguous phrases.

On the other hand, a clearly contingent gift, *e.g.*, a gift to *such* of a class of persons as shall be living at a particular date, is not susceptible of explanation; for it is unambiguous, and only those can take vested interests who are living at the date indicated (*Bull v. Pritchard* (1826), 1 Russ. 213).

Gifts clearly contingent.

In the case of a legacy to trustees in trust for A. for life, and after his death to his children, then as the postponement of enjoyment by the children is merely to let in the prior life interest of A., the shares of the children vest immediately on the death of the testator, in those who are then in existence, subject to a partial divestment in favour of any children who may be subsequently born, the latter taking vested interests at birth. Consequently, the share of a child dying after the testator, but in A.'s lifetime (even if it lives only a few minutes), passes to its personal representatives. In short, the gift is not contingent on the children surviving A. (*Hallifax v. Wilson* (1809), 16 Ves. 168).

Payment postponed for convenience of estate or to let in a prior interest.

The rule is equally applicable to property settled by deed. Thus where, by marriage settlement, property is settled in trust for the wife for life, and after her death for

Rule equally applicable to deeds.

**Art. 49.** such of the children of the marriage as she may appoint, and, in default of appointment, to pay the principal and all arrears of interest to all children of the marriage in equal shares, there is "a vested interest in all the children she might ever have, upon their respective births, to be divested by the exercise of the power of appointment" (*per* ARDEN, M.R., *Vanderzee v. Aclom* (1799), 4 Ves. 771; *Re Howard* (1858), 7 Ir. Ch. Reps. 350; *Reilly v. Fitzgerald* (1843), 6 Ir. Eq. Reps. 335).

Interposition  
of a life  
estate does  
not neces-  
sarily vest the  
remainder.

On the other hand it must not be hastily assumed that the interposition of a life estate necessarily vests the remainder expectant on its determination. Thus in *Re Deighton's Settled Estates* (1876), 2 Ch. D. 783, there was a trust for testator's wife for life, and after her death to apply the income for the maintenance of his children then living and the issue of those then dead, *per stirpes*, until the youngest surviving child should attain twenty-one; and then to sell and divide between all the children then living and the issue then living of any deceased children. The youngest child attained twenty-one in the lifetime of the widow. It was, however, held that on the true construction of the will the words "then living" referred to the date of distribution and not the date when the youngest child attained majority, and that consequently those children who died between the date when the youngest attained twenty-one and the death of the widow took nothing.

#### PARAGRAPH (2) (b).

Gifts "at"  
or "when"  
or "from and  
after" the  
happening of  
an event and  
*Prima facie*  
contingent.

Where the gift is to A. for life, and after his death to his children at "twenty-one" (*Stapleton v. Cheele* (1711), Pr. Ch. 315), or "upon attaining twenty-one" (*Leake v. Robinson* (1817), 2 Mer. 363), or "when" or "as," or "from and after" they shall attain twenty-one (*Hanson v. Graham* (1801), 6 Ves. 239; *Davies v. Fisher* (1842), 5 Beav. 201), the postponement is *prima facie* construed as being personal to the donee, and, consequently,

no child takes who dies before attaining that age (*Leake v. Robinson*, *supra* ; *Re Francis*, *Francis v. Francis*, [1905] 2 Ch. 295, referred to in detail, *infra*, p. 273). For an example where the gift was to take effect at the expiration of ten years, see *Smell v. Dee* (1700), 2 Salk. 415, and *Re Eve*, *Belton v. Thompson* (1905), 93 L. T. 235, as to wills ; *Re Theed's Settlement* (1857), 3 K. & J. 375, as to deeds. In the last case, Wood, V.-C., stated the rule as follows : "The question in all such cases, is whether the period of division is postponed on account of previous interests in the fund which are given to other persons in the meantime, or on account of some qualification attached to the donee. In the former case, the deferred interest vests on the execution of the settlement : in the latter it is contingent."

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Para. (2) (b).

## PARAGRAPH (3).

The express mention of the attainment by the donee of a given age is not, however, conclusive evidence that such attainment is a condition precedent to vesting. Of course, where the gift or trust is in favour of *such* members of a class as shall attain a given age, only those will take who satisfy the words, *i.e.*, who live to attain the given age (*Leake v. Robinson*, *supra* ; *Dewar v. Brooke* (1880), 14 C. D. 529). In such cases there is no ambiguity. But where there is ambiguity—for instance, where there is a direction to pay a legacy *at or when* A. B. attains a given age—then a more minute examination of the document becomes necessary. If such words stand alone, there is a very strong presumption that the gift is contingent ; but that presumption does not arise where the gift and the direction for payment are distinct. For, in the latter case, the inference is that by separating the gift from the time of payment of it, the donor intended that the vesting should not be contemporaneous with the period of distribution (*Re Bartholomew* (1849), 1 M. & G. 354 ; *Lister v. Bradley* (1841), 1 Ha. 10 ; *Williams v. Clark* (1851),

*Prima facie*  
inference of  
contingency  
rebuttable.

Gift distinct  
from direc-  
tion as to  
payment.

**Art. 49.** 4 De G. & S. 472, as to wills : and *Hynes v. Redington* (1844), 1 J. & Lat. 587, and *Jopp v. Wood* (1865), 2 De J. & S. 323, as to deeds).

Gift of inter-  
mediate  
income.

The *prima facie* presumption that words of contingency, such as "when," "as," "upon," etc., prevent immediate vesting, may also be rebutted (at all events in the case of wills), by the fact that the testator has directed that the whole of the intermediate income shall be applied to or for the benefit of the donee (*Hanson v. Graham* (1801), 6 Ves. 239). As was said by TURNER, L.J., in *Re Hart* (1858), 3 De G. & J. 202, "where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift with a postponed payment ; and if the interest is given in the meantime, it shows that a present gift was intended" (applied *In re Gossling, Gossling v. Elcock*, [1903] 1 Ch. 448). This rule, however, only prevails where the direction to apply the income or some part of it is imperative (*Fox v. Fox* (1875), 19 Eq. 286 ; *Re Turney, Turney v. Turney*, [1899] 2 Ch. 739). A direction to apply the income for maintenance or to accumulate is insufficient (*Vardrey v. Geddes* (1830), 1 R. & M. 203), and, *à fortiori*, a mere power to apply does not raise any inference in favour of vesting (*Leake v. Robinson* (1817) 2 Mer. 363 ; *Fox v. Fox*, *supra* ; *Re Wintle, Tucker v. Wintle*, [1896] 2 Ch. 711 ;\* *Dewar v. Brooke* (1880), 14 Ch. D. 529 ; *Russell v. Russell*, [1903] 1 L. R. 168). Nor does the rule apply where the gift of interest is equally contingent with the gift of the capital (*Knight v. Knight* (1826), 2 S. & S. 490 ; *Morgan v. Morgan* (1850), 4 De G. & S. 164). Nor where a fixed sum is given for maintenance, although it may be equal to the whole income (*Boughton v. Boughton* (1848), 1 H. L. Cas. 406 ; *Watson v. Hayes* (1839), 5 M. & C. 125). The rule, how-

\* The doubt thrown by NORTH, J., in this case, on the decision of JESSEL, M.R., in *Fox v. Fox*, *supra*, has been disapproved by LINDLEY, M.R., and JENNE P., in *Re Turney, Turney v. Turney*, *supra*.

ever, is none the less applicable because the balance only of the income is directed to be paid, after first satisfying an annuity or other charge (*Jones v. Mackilwain* (1826), 1 Russ. 220; *Potts v. Atherton* (1859), 28 L. J. Ch. 486). A direction to apply income for the common maintenance of a class, will not, however, vest the shares of individual members of the class (*Re Parker, Barber v. Barber* (1880), 16 Ch. D. 44; *Re Merrin, Merrin v. Crossman*, [1891] 3 Ch. D. 197; *Re Gosling, Gosling v. Elcock*, [1903] 1 Ch. 448, in which the rule (stated in the court below, [1902] 1 Ch. 945) was recognised, although on the true interpretation of the will it was held to be inapplicable).

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Para. (3).

At one time it was considered that the effect of a gift of intermediate income on vesting, was confined to wills, on the ground that it is a rule derived from the Roman civil law and applied by the ecclesiastical courts (which administered that law) in the construction of wills of personal estate (of which they had cognizance), and that therefore, it could not govern the construction of deeds which were outside the jurisdiction of the ecclesiastical courts. As, however, was observed by a learned Irish judge, rules of construction are not rules of law, but rules intended to enable courts to arrive at a man's true meaning; and a rule for that purpose which the Chancery judges have adopted from the civil law, is none the less applicable to deeds, because the courts which originally administered the civil law had no jurisdiction over deeds. He therefore held (and it is conceived rightly) that the rule is equally applicable to deeds, because the reasons on which it is founded are as applicable to deeds as to wills (see *Mostyn v. Branton* (1866), 17 Ir. Ch. Rep. 153, following *Re Orme* (1850), 1 *ibid.* 175, but *cf. Jopp v. Wood* (1865), 28 Beav. 53; 2 De G. & S. 323, and *Hubert v. Parsons* (1750), 2 Ves. sen. 264).

Rules as to the vesting effect of a gift of intermediate income also applies to deeds.

A direction to sever a gift from the testator's general estate, and to accumulate the income, and to hold *corpus*

Direction to sever gift from general

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## Para. (3).

estate and  
to accumu-  
late income  
favour  
vesting.

and accumulations in trust for a donee "at" or "upon attaining" twenty-one, will generally be construed in favour of immediate vesting (*Saunders v. Vautier* (1841), 1 Cr. & Ph. 240; *Festing v. Allen* (1847), 5 Ha. 573; *Re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507; *Re Bevan* (1887), 34 Ch. D. 716; *Brennan v. Brennan*, [1894] 1 Ir. R. 69).

Court leans  
in favour of  
vesting of  
residuary  
gifts.

In ambiguous cases the court leans in favour of vesting a gift of residue, so as to avoid a possible intestacy (*Booth v. Booth* (1798), 4 Ves. 399; *Pearman v. Pearman* (1863), 33 Beav. 394; *West v. West* (1863), 4 Giff. 198).

Effect on  
vesting of  
a gift over  
on failure to  
attain the  
given age.

Where there is a gift to a *class* at a given age, and the testator directs that the *shares* of those dying under that age shall go to the survivors, each member of the class takes an immediate vested interest, subject to be divested in the event of his dying under the given age; for otherwise the gift over would be superfluous (*Re Edmondson's Estate* (1868), 5 Eq. 389). But the same reasoning does not apply in the case of a gift to an individual at twenty-one, with a gift over if he dies under that age (*Malcolm v. O'Callaghan* (1817), 2 Madd. 349; *Re Payne* (1857), 25 Beav. 556; but *cf. Davies v. Fisher* (1842), 5 Beav. 201, and *Ridgway v. Ridgway* (1851), 4 De G. & S. 271).

Effect on  
vesting of a  
gift over on  
some other  
contingency  
than the  
attainment  
of the given  
age.

It was formerly held that where there is a gift "at" or "upon attaining" *twenty-five*, with a gift over in the event of the donee dying under *twenty-one*, the gift is vested at twenty-one (*Re Gunning* (1884), 13 Ir. L. R. 203); and that the same result occurs where the gift over is in the event of death under the given age *without issue* (*Bland v. Williams* (1834), 3 M. & K. 411, and see, also, *Re Thomson's Trusts* (1870), 11 Eq. 146, and *Re Knowles, Nottage v. Barton* (1882), 21 Ch. D. 806). So a gift after a life interest to the children of the life tenant "at" twenty-one, with a gift over in the event of the life tenant

dying without leaving issue, has been held to be vested *at the death of the life tenant*, but not before (*Bree v. Perfect* (1844), 1 Coll. 128; *Re Wrangham* (1860), 1 Dr. & Sm. 358; *Kidman v. Kidman* (1871), 40 L. J. Ch. 359, and see also *Re Beran* (1887), 34 Ch. D. 716). However, all these cases have been somewhat shaken by the recent decision of the Court of Appeal in *Re Edmonds, Jones v. Jones*, [1906] 1 Ch. 570, where it was held that a bequest to testator's children "who shall attain" the age of twenty-one years, with a gift over in the event of the testator's death without leaving *any* child, was a contingent gift to the children; ROMER, L.J., saying: "I think that where you have words which *prima facie* import contingency, though they are somewhat ambiguous, you will not turn them into non-contingent words, and make gifts to the children vest at birth, merely because you have a gift over on the parent dying without children."

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Para. (3).

## PARAGRAPH (4).

Where there is a gift to a class when the youngest member of it attains twenty-one, it is clear that every member of the class who attains twenty-one takes a vested interest, although he may not live until the youngest attains that age, or although the youngest may die under that age (*Leeming v. Sherratt* (1842), 2 Ha. 14; *Re Hunter's Trusts* (1865), 1 Eq. 295). This vesting is, however, subject to partial divesting in order to let in any future born members of the class who may come into existence before the period of distribution (*Re Stephens, Kilby v. Batts*, [1904] 1 Ch. 322, following *Watson v. Young* (1885), 28 Ch. D. 436, and see also, *supra*, pp. 104, 105, where the period for the ascertainment of the members of such a class is treated of in more detail). Moreover, it would seem from a decision of HALL, V.-C., in *Coldicott v. Best* (W. N. (1881) 450), that the attainment of twenty-one by each member of the class is a condition precedent to vesting. But where there is anything else in the will

Gift to a class when the youngest attains twenty-one.

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Para. (4).

which favours earlier vesting (*e.g.*, where the intermediate income is given for maintenance, as in *Re Grove's Trusts* (1862), 3 Giff. 575 ; and *Boulton v. Pilcher* (1860), 29 Beav. 633), there will be immediate vesting ; and where the gift is to *personæ designatæ* when the youngest attains twenty-one, the gift will vest immediately (*Cooper v. Cooper* (1860), 29 Beav. 229 ; *Re Lyman* (1860), 2 L. T. (N.S.) 662).

## PARAGRAPH (5).

Contingency attached to original gift not extended to gift over.

The leaning of the courts in favour of vesting is exemplified in its disinclination to extend a condition precedent beyond the persons to whom it strictly applies. Thus in a gift to A. for life, with remainder to such of a class as shall survive him, and the children, *per stirpes*, of such members of the class as shall die before A., the contingency of surviving the life tenant is *primâ facie* confined to the original members of the class, and is not extended to their children. Consequently if a member of the class dies in A.'s lifetime, his children take immediate vested interests whether they survive A. or not (*Martin v. Holgate* (1865), L. R. 1 H. L. 175 ; *Re Orton's Trust* (1866), 3 Eq. 375 ; *Burt v. Hellyar* (1872), 14 Eq. 160 ; *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206). Nor is there any difference in this respect where the gift is substitutional and not original (see *infra*, pp. 310 *et seq.*). But, as in all cases of vesting, this inference is capable of being rebutted by other expressions in the document (*Bennett v. Merriman* (1843), 6 Beav. 360 ; *Re Kirkman's Trusts* (1859), 3 De G. & J. 558).

## PARAGRAPH (6).

Gift over will take effect on failure of prior gift, although it fails in a way not contemplated.

Where a legacy is settled in trust for A. for life, with remainder to the child of which she was *enceinte* at the date of the will, but if such child *die* under twenty-one, then to B., and it turns out that A. was not *enceinte*, the gift to B. will take effect, although the failure of the previous gift does not take place in the way contemplated by the tes-

tator, viz., by the death under twenty-one of the imaginary child (*Jones v. Westcomb* (1711), Tud. Ld. Cas. Con., 470). So where property is given to A. for life or until bankruptcy, followed by a gift over *in the event of bankruptcy* to B., the latter will take a vested interest expectant on the bankruptcy or death of A. (*Re Akeroyd, Roberts v. Akeroyd*, [1893] 3 Ch. 363), and a similar result occurs where the gift is to a woman for life or during widowhood with a gift over *on re-marriage* (*Luxford v. Checke* (1684), 3 Lev. 125) ; even although the gift over on re-marriage is to the widow herself and others (*Underhill v. Roden* (1876), 2 Ch. D. 494). In the converse case, where the gift over is expressed to be on death, it will also take effect on re-marriage (*Stanford v. Stanford* (1887), 34 Ch. D. 362). In short, in all such cases, there is a necessary implication that the gift over was to take effect on the determination, *in any manner* of the preceding estate, and was not contingent on its determination in a particular manner. See also *Re Shuckburgh's Settlement, Robertson v. Shuckburgh*, [1901] 2 Ch. 794, and *supra*, p. 182.

This presumption, however (like other presumptions), must, of course, give way to unambiguous and clear language, for an example of which see *Re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640.

The principle is equally applicable to deeds as to wills (*Oshorn v. Bellman* (1860), 2 Giff. 593, and *Barnes v. Jennings* (1866), L. R. 2 Eq. 448).

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Para. (6).

Same principle applicable to deeds.

#### ART. 50.—*Vesting of Real Estate.*

(1) In the construction of devises of real estate all estates are holden to be vested, unless a condition precedent to vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will (*Boraston's Case* (1587), 3 Reps. 21).

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(2) Words of apparent condition will be read as merely postponing possession, and not vesting; and where the devise is clearly conditional, the condition will, if possible, be read as a condition subsequent and not precedent, so as to cause the estate to be vested subject to be divested (*Duffield v. Duffield* (1829), 1 Dow & Cl. 268, at p. 311).

## PARAGRAPH (1).

Clear  
condition  
precedent.

If the gift is clearly dependent on a condition precedent, effect must be given to the condition. Thus, in a devise to *such* children as shall attain twenty-one, the attainment of twenty-one is part of the description of the devisees. "It is impossible to say that the words do not import conditions precedent to the vesting. The estates are not given to any particular children by name, but to *such* children as shall attain the age of twenty-one years: until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will; and therefore there is no person in whom the estates can vest" (*per* BEST, C.J., *Duffield v. Duffield* (1829), 1 Dow. & Cl. 268, 314), and this appears to be so, notwithstanding a gift over in default of a child attaining the required age (*Festing v. Allen* (1843), 12 M. & W. 279).

So, where there is a devise to A. for life, and after his death to such of his children as shall attain twenty-one, the class is a contingent class, to be ascertained (where the will was made before the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33)), at the death of A., and those who have not then attained twenty-one are excluded (*Festing v. Allen*, *supra*). But it is conceived that this would not be so in wills made since the Act. See *Blackman v. Fysh*, [1892] 3 Ch. 209. Anyhow where the gift is to all the children of a tenant for life, who either, during his life *or afterwards*, shall attain twenty-one, then, as the gift cannot take effect as a contingent remainder, it will be construed as giving vested

interests to all children who have attained twenty-one at the death of the tenant for life, with an executory limitation divesting them *pro tanto* to let in other children as they attain twenty-one (*Re Lechmere and Lloyd* (1882), 18 Ch. D. 524; *Dean v. Dean*, [1891] 3 Ch. 150; dissenting from *Brackenbury v. Gibbons* (1876), 2 Ch. D. 417).

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Para. (1).

Where the gift is to a child *when* it attains twenty-one it is clearly contingent (*Re Francis, Francis v. Francis*, [1905] 2 Ch. 295). As SWINFEN EADY, J., said in that case, "The devise to Hilda, standing alone as it does, and not preceded by any intermediate interest, is contingent, and the attainment of twenty-five is a condition precedent to the estate vesting in her. It is the case of a devise *which is in form contingent, and which stands alone and without any context to enable the court to hold it to be vested*. There is not in terms any gift or disposition of the rents until Hilda attains twenty-five, which might have enabled the court to say that attaining the prescribed age no more imported a condition precedent than any other words indicating that the remainderman was not to take until after the determination of the particular estate. Nor is there in terms any gift over on Hilda dying under twenty-five, which might have enabled the court to hold that Hilda took whatever was not given over to the party claiming under the devise over, and to construe the condition as a condition subsequent, divesting a previously vested estate." See also *Grant's Case* cited in *Lampet's Case* (1613), 10 Reps. 46 b; *Phipps v. Ackers* (1842), 9 Cl. & F. 583; *Andrew v. Andrew* (1875), 1 Ch. D. 410; *Lore v. Lore* (1881), 7 Ir. L. R. 306; *Kiersey v. Flarahan*, [1905] 1 I. R. 45.

#### PARAGRAPH (2).

Where, however, words clearly conditional do not necessarily import a condition *precedent*, they will be construed as a condition subsequent, so as to avoid a partial intestacy or resulting use in favour of the testator's or

Conditional words not clearly precedent.

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settlor's heir, the court regarding such partial and temporary estates in an heir as undesirable. Thus, where the property is given to some third person prior to the attainment of the given age by the devisee, the court regards the gift to the devisee as in fact only a remainder taking effect in its natural order on the determination of the preceding estate, and considers that attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estate (*per* TINDEL, C.J.; *Phipps v. Ackers* (1835), 9 Cl. & F. 591; and see *Goodtitle v. Whitby* (1765), 1 Burr. 228; *Boraston's Case* (1587), 3 Co. 19a).

Gift over  
may vest a  
gift.

So again, where the property is expressly given over in the event of the devisee failing to attain the given age, the court considers that the gift over sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the gift over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested in a future contingency (*per* TINDEL, C.J., *Phipps v. Ackers*, *supra*; and see *Edwards v. Hammond* (1684), 1 B. & P. N. R. 324 *n.*).

Example  
where inter-  
mediate life  
estate and  
gift over.

Both these considerations (gift of intermediate income and a gift over) were applicable in the instructive case of *Andrew v. Andrew* (1874), 1 Ch. D. 410. There a testator devised lands to T. during his life, and from and after his decease, to his eldest son if he should have arrived at the age of twenty-one years, and *in default of having a son, then over*. T. died, leaving an eldest son a minor. It was held by the Court of Appeal, that, on the death of T., his eldest son took an estate in fee, liable to be divested on his death under the age of twenty-one years, with an executory gift over in that event, and that consequently the rents and profits were not undisposed of between the death of T. and the attainment of twenty-one by his son. JAMES, L.J., said: "The conclusion which

the vice-chancellor felt himself compelled to arrive at is startling, and is obviously one which the testator could never have intended—which no sane testator could have intended—namely, that during the minority of his son's eldest son, the person especially designated to take the estates, and to be, so far as these particular considerable estates are concerned, the head and representative of the family, he should be left penniless, and the estates should go away during that time from the family of his son to the testator's heir-at-law, for the time being . . . It must be conceded that the words of gift to the son's eldest son, standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest. But these words do not stand alone. They are preceded by the life estate to Thomas, and they are followed by the words 'and in default of his having a son . . . I give and bequeath the same to the eldest son of Henry for ever.' Now the words 'in default of having a son' or words of precisely the same import, have been uniformly held to mean that the estates are not to go over so long as there is any male issue, and that the estates are, by necessary implication, to go to the male issue in regular course of hereditary descent so long as there should be any left. To effectuate this purpose, an estate tail is, by necessary implication, deemed to be given to the person whose issue are so to take, so that the limitations would stand thus: To Thomas for life; to Thomas' eldest son if he should have arrived at the age of twenty-one years, or on his attaining that age; to Thomas in tail male, remainder to Henry's eldest son in fee. There is a long category of cases from very early times down to a very recent decision of the Master of the Rolls, in which the words 'if,' 'when,' 'so soon as,' have been held from the context, not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent, operating as a defeasance of an estate vested. And we should be well warranted by

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Para. (2).

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the authorities in so dealing with this case, inasmuch as the limitations were plainly intended to make a complete settlement of the property to a man for life, then to that man's eldest son on his attaining the age of twenty-one, with a remainder over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age) with an ultimate remainder over to another branch of the family. But all doubt and difficulty are in this case removed by the fact that the gift is actually expressed to be what, without the express words, we should have implied it to be, viz., that the gift is expressed to be 'from and after' the death of the tenant for life."

Gift to A.  
if he attains  
twenty-one,  
with a gift  
over if he  
dies under  
that age  
*without issue*.

The courts so far favour the vesting of real estate as to hold, that where there is a devise to A. if or when he shall attain twenty-one, with a gift over if he dies under that age *without issue*, he takes a vested interest subject to be divested only on the happening of *the double event*, viz., (1) death under twenty-one, and (2) without issue (*Phipps v. Ackers* (1842), 9 Cl. & F. 583). The same rule applies equally to gifts to classes as to gifts to individuals (*Randoll v. Doe* (1817), 5 Dow. 202), and also to gifts by way of trust (*Phipps v. Ackers*, *supra*, and *Stanley v. Stanley* (1809), 16 Ves. 491).

Gift to  
several for  
life in suc-  
cession, with  
remainder  
to A., if the  
first tenant  
for life be  
then dead,  
is vested.

On similar principles, where there is a limitation to A. for life with remainder to B. for life, with remainder to C. in fee, *if A. be then dead*, the latter words are construed to mean no more than that the gift to C. is to be subject to A.'s life estate (*Maddison v. Chapman* (1858), 4 K. & J. 709, and see also *Edgeworth v. Edgeworth* (1869), L. R. 4 H. L. 35; *Leadbetter v. Cross* (1876), 2 Q. B. D. 18; *Re Blight*, *Blight v. Hartnoll* (1880), 13 Ch. D. 858, and *Re Martin*, *Smith v. Martin* (1885), 54 L. J. Ch. 1071). The same construction has more recently been given to an appointment under a power (*Re Shuckburgh's Settlement*, *Robertson v. Shuckburgh*, [1901] 2 Ch. 794).

To A. for  
life with  
remainder to

On the other hand, where there was a gift to A. for life with remainder to the children of B., *if he leaves any heir*

*surviving*, it was held that the gift failed by reason of A. dying in B.'s lifetime, as it was contingent upon B. leaving children *him surviving* (*Price v. Hall* (1868), L. R. 5 Eq. 399), and was, consequently, void under the then law for want of a particular estate to support it.

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the children of B., if any survive him, contingent.

### ART. 51.—*Vesting of Legacies and Portions Charged on Real Estate.*

(1) Legacies and portions charged on real estate do not *prima facie* vest until the time fixed for payment, even although interest be given in the meantime, unless the payment is clearly postponed for the benefit of the estate, or merely to let in a prior life or other limited interest.

(2) But where the attainment of a given age is fixed for payment, the gift will vest on the attainment of that age, although actual payment is further postponed for the benefit of the estate, or until the dropping of a life or other prior limited interest.

(3) In gifts to a class of children where no period for the payment is fixed, the presumption is that the shares of children are intended to become vested when they are wanted, viz., in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage.

#### PARAGRAPH (1).

Owing to the favour shown by the common law to the preservation of family estates intact, courts of equity, while adopting the principles of the civil law in relation to the early vesting of personal estate, took a contrary view

Reasons for the rule.

**Art. 51.** with regard to the vesting of legacies and portions charged on real estate (*Remnant v. Hood* (1861), 2 De G. F. & J. 396).

Para. (1).

Consequently, the presumption of our courts is, that such gifts are not vested until they are payable. As Lord HARDWICKE put it, in *Prowse v. Abingdon* (1738), 1 Atk. 482 : "It is very clear that charges on land, payable at a future day, cannot be raised if the party dies before the day of payment : there is no difference at all whether the charge is created by deed or will, nor whether it is provided by way of portion for a child, or given merely as a legacy by collateral relations or others." See also *per* COTTENHAM, C., *Evans v. Scott* (1844), 1 H. L. Cas., p. 57, and *Boycot v. Cotton* (1738), 1 Atk. 552. Consequently, if the donee dies before the date named for payment, the charge sinks into the land for the benefit of the inheritance (*Powlet v. Powlet* (1683), 1 Vern. 204, 321 ; *Henty v. Wrey* (1882), 21 Ch. D. 332). Nor will a gift of intermediate interest 'accelerate' the vesting (*Gawler v. Standerwick* (1788), 2 Cox, 15 ; *Parker v. Hodgson* (1849), 1 Dr. & Sm. 568).

Rule equally applicable to wills and deeds.

The rule is as applicable to portions charged on land by settlement as to legacies (*Wakefield v. Maffet* (1885), 10 App. Cas. 422), and to the construction of powers authorising a person to appoint portions charged on real estate (*Henty v. Wrey, supra*).

Presumption against vesting may be rebutted by clear words

Where, however, the language is clear and unambiguous effect must be given to it (*per* LINDLEY, L.J., *Henty v. Wrey, supra* ; *Watkins v. Cheek* (1823), 2 S. & S. 199). And so, where the payment is obviously postponed, merely for the benefit of the estate, the vesting is immediate (*Remnant v. Hood, supra* ; *King v. Withers* (1725), 3 P. Wms. 414). For instance, where Blackacre is given to A. for life, and after his death to C. in fee, charged with a legacy of £500 to D., the latter takes an immediate

vested interest on the death of the testator, whether he dies in the lifetime of the tenant for life or not (*Smith v. Partridge* (1755), Amb. 266). **Art. 51.**  
 Para. (1).

## PARAGRAPH (2).

So where payment is postponed, partly for the benefit of the estate (*e.g.*, until after the death of a life tenant), and partly for reasons personal to the donee (*e.g.*, until he attains twenty-one), the vesting will take place when he attains twenty-one, whether in the lifetime of the tenant for life or not (*per* Lord HARDWICKE, C.: *Louth v. The City of London* (1740), 2 Atk. 127, 131; *Ruby v. Foot* (1817), Beat. 581; *Perfect v. Lord Curzon* (1820), 5 Madd. 442; and *per* Lord FITZGERALD, *Wakefield v. Maffet* (1885), 10 App. Cas., at p. 435). Payment postponed partly for benefit of estate, and partly for reasons personal to donee.

## PARAGRAPH (3).

Where the settlement or will names no time for payment of portions or legacies charged on land *in favour of a class of children*, they will, *prima facie*, take vested interests, in the case of boys, on attaining twenty-one, and in the case of girls, at twenty-one or marriage, and not before (*Emperor v. Rolfe* (1750), 1 Ves. sen. 208; *Duches v. Huquelin* (1863), 1 H. & M. 730; *Boycot v. Cotton* (1739), 1 Atk. 555; and see also *Remnant v. Hood* (1860), 2 De G. F. & J. 413, 414; *Reilly v. Fitzgerald* (1843), 6 Ir. Eq. R. 335; *Re Wilmott's Trusts* (1869), 7 Eq. 532; and as to wills, *Re Knowles, Nottage v. Burton* (1882), 21 Ch. D. 806; and *Jackson v. Dorer* (1864), 2 H. & M. 209, 215). Where the instrument affords no indication of vesting period, the portions will not vest until twenty-one, or, in case of daughters, twenty-one or marriage.

And where the legacy or portion is only to be received and payable on the happening of a certain event, which may or may not take place, the vesting is contingent on the event taking place (*Taylor v. Lambert* (1875), 2 Ch. D. 177). Vesting plainly contingent.

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**ART. 52.**—*Vesting of Legacies and Portions charged on Mixed, Real, and Personal Estate.*

(1) Where legacies (or, *semble*, portions) are charged both on real and personal estate, then, *primâ facie*, the personal estate is applied first, and the real estate only in aid of it.

(2) So far as the personal estate will extend, the vesting is governed by the rules stated in Art. 49, *supra*; and, so far as it is necessary to resort to the real estate, the vesting is governed by the rules stated in Art. 51, *supra* (*Parker v. Hodgson* (1849), 1 Dr. & Sm. 568; *Chandos v. Talbot* (1731), 2 P. W. 601, 612).

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## CHAPTER III.

PRINCIPLES RELATING TO THE DIVESTING OF  
VESTED INTERESTS.

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ART. 53.—*Formalities essential to the Legality of  
Divesting Provisions.*

(1) A direct grant of freehold land to A. for any estate or interest can only be taken away from A. and given to B. on the happening of a contingency, by means of a use operating under the Statute of Uses.

(2) A similar grant of copyhold or leasehold land or of pure personalty can only be effected by the interposition of a trustee.

(3) A trust of real or personal estate, whether created *inter vivos* or by will, and also a direct devise or bequest of real or personal estate may be made to shift on a contingency from the donee to another without any technical device.

This article is rather a statement of substantive law than a rule of interpretation, but as it has to be borne in mind in interpreting instruments it has been considered proper to state it shortly.

## Art. 53.

## PARAGRAPH (1).

## Para. (1).

No remainder  
at common  
law on breach  
of a condition  
subsequent.

No estate in remainder after a fee simple in freehold land can, at common law, be limited to take effect on the breach of a condition, or the happening of a contingency : but the same result can readily be effected by means of a shifting use : subject, of course, to the rules as to perpetuities, repugnancy, etc., which form part of the substantive law of property.

Thus, if there is a grant by deed to A. "in fee simple," or to "A. and his heirs," with a gift over to B. if A. dies without issue, the gift over is void, and A. takes absolutely (*Idle v. Cook* (1705), 1 P. Wms. 70). In some cases no doubt such a gift to A. and his heirs has been held to be cut down to an estate tail by the gift over, the words heirs being, in fact, read by the light of the gift over as heirs of the body (*Morgan v. Morgan* (1870), 10 Eq. 99) ; but it is doubtful whether the court would do so now, as to which the reader is referred to p. 225, *supra*. But anyhow such cases have never been treated as cases of *gifts over*, to take effect in certain events, but as ambiguous gifts, which, although *ostensibly gifts in fee*, are, on the true interpretation of the instrument, gifts in tail.

Same result  
may be  
attained by  
means of a  
shifting use.

However, although a direct gift of real estate cannot be made to shift from A. to B. on the happening of a contingency, yet the same thing can be effected by the interposition of a use.

Thus, nothing is more common in marriage settlements than a grant to A. and his heirs to the use of B. and his heirs until the marriage, and then to the uses of the settlement. So, again, where in a strict settlement a power of sale is given to the trustees, the transfer of the property to the purchaser is always affected by an appointment under a power operating under the Statute of Uses, to take the property out of the settlement and vest it in fee in the purchaser.

## PARAGRAPH (2).

## Art. 53.

## Para. (2).

The rule of the common law, that real estate could not be made to shift from one donee to another, was equally applicable to personal estate. Indeed, the rule as to personalty was more strict, as it could only be given absolutely and not for successive interests at all. However, just as the difficulty as to real estate was got over by the invention of uses (subsequently converted into legal estates by the Statute of Uses (27 Hen. 8, c. 10) ), so with regard to personalty the difficulty was overcome by the invention of trusts. The legal ownership is vested in a trustee, and then shifting trusts can be freely declared in relation to it, so long as no positive rule of law relating to public policy or morality is infringed.

Conditions subsequent in relation to personal estate can only take effect through medium of trust in case of gifts *inter vivos*.

With regard to gifts *mortis causa*, however, the courts have long held that both real and personal property can, without the intervention of uses or trusts, be so settled, by will or codicil, as to shift from one donee to another on the happening of a contingency. Such gifts are called executory devises or bequests; and, like shifting uses and trusts, are generally free from restrictions, with certain exceptions, which will be found in any work on property law.

*Aliter* with regard to gifts *mortis causa*.

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ART. 54.—*General Principles for interpreting Divesting Provisions.*

(1) A provision purporting to divest in certain events a gift once vested, is not favoured by the court, which will be astute to find other expressions, making it doubtful whether the document should be interpreted literally, in which case the gift over will be restricted to the happening of the contingency *before* the first gift is vested. In particular, in gifts by will to the

**Art. 54.** children of a tenant for life, with a gift over if he dies without leaving children, the gift over will be restricted to the case of his dying without having had a child who attained a vested interest.

(2) Where, however, the instrument will not bear this interpretation then the gift over will be strictly construed, and will not take effect unless the exact contingency is indicated with certainty and actually happens; unless (*semble*) the gift over is merely the substitution of issue for the original donee (*a*)).

#### PARAGRAPH (1).

Instances of  
disclination  
of court to  
favour  
divesting of  
vested  
interests.

Thus, where property is given to one for life, with remainder to a class *at* twenty-one, with a gift over of the share of any member of the class who may die before the share is *payable* (*Hallifax v. Wilson* (1809), 16 Ves. 168; *Moratta v. Lindo* (1837), 9 Sim. 56; *Walker v. Main* (1819), 1 Jac. & W. 1), or before the donee becomes entitled *in possession* (*Re Yates' Trusts* (1852), 16 Jur. 78), or entitled *to the receipt* (*Hayward v. James* (1860), 28 Beav. 523), the court will seize on any expressions which will enable it to construe “payable,” etc., as equivalent to “vested” as distinguished from “distributable.” In such cases, therefore, if the first donee should attain twenty-one, his subsequent death before the period of distribution would not cause the gift over to take effect.

Tendency  
accentuated  
in the case  
of marriage  
settlements.

This principle is more especially applied in the case of children claiming under a marriage settlement, or children of a testator, or of persons to whom he has given a prior life interest. Thus it was laid down broadly in *Howgrave v. Cartier* (1814), 3 V. & B. 85, that “if the settle-

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(a) See *Re Maumder, Maumder v. Maumder*, [1902] 2 Ch. 875; affirmed, [1903] 1 Ch. 451.

ment clearly and unequivocally makes the right of a child to a provision to depend upon its surviving both or either of its parents, a court of equity has no authority to control that disposition (*b*). But if the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction which gives a vested [*i.e.*, indefeasibly vested] interest to the child when that child stands in need of a provision, usually as to sons at twenty-one, and as to daughters at that age or marriage." This is usually known as the rule in *Emperor v. Rolfe* (1750), 1 Ves. sen. 208, which was acknowledged by the House of Lords in *Wakefield v. Maffet* (1885), 10 App. Cas. 422, to be binding.

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Para. (1).

The following cases will show to what an extent the principle has been carried :

In *Hagyard v. James* (1860), 28 Beav. 523, a testator, after giving a life tenancy in a share of his estate to his daughter, directed that on her death her share should be held in trust for her children, to be equally divided if more than one, "and paid to such of them as being sons at the age of twenty-one years and to such of them being daughters at that age or marriage with benefit of survivorship amongst such children if either of them shall die before his or her share shall become payable," with a gift over in the event of all such children dying "without becoming entitled to the receipt of the said trust moneys":

Gifts over on death before legacy "payable."

*Held*, that the last phrase was to be construed as "without having attained twenty-one or in case of daughters having been previously married." The *ratio decidendi* was, that in the first gift the testator had fixed the date of

(b) See instances in *Farmer v. Barker* (1852), 9 Hare, 737; *Tucker v. Harris* (1832), 5 Sim. 538; and *Eythoson v. Eythoson* (1854), 23 L. J. Ch. 1004.

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Para. (1).

*payment* at twenty-one or marriage, and that the words “entitled to the receipt” were only a paraphrase of the word “payable.” In short, in these cases the court strives to hold that a gift over on death before becoming *entitled to payment*, does not mean before actual payment (as to which see *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100), but payment subject to the determination of a prior interest.

Gifts over on death before becoming “entitled in possession.”

The same decision was arrived at in *Re Yates’ Trusts* (1852), 16 Jur. 78, where the gift over was in the event of a child dying before becoming “entitled in possession.” PARKER, V.-C., there recognised that the general rule was “not to divest an interest vested, unless there was a clear direction to that effect in the will. There were many cases under wills and also under settlements for the benefit of children, in which the court had applied this rule so as not to make the interests of the children depend on their surviving the tenant for life. In other cases the court had tried to construe the interests as vested at the particular ages at which the testator intended, and not to make the *vesting* depend on their surviving . . . His Honour could not see that the words ‘entitled in possession’ were more ambiguous than the word ‘payable.’ ‘Payable’ was in itself a very clear expression, but it might be construed in two senses—one the literal signification, the other short of its full meaning, and more applicable to *the person of the legatee*. In *Hallifax v. Wilson* (1809), 16 Ves. 168, it was used in this latter sense, short of its full meaning. The words ‘entitled in possession’ were open to the same observation.”

Where will contradictory absolute vesting favoured.

In *Dalton v. Hill* (1862), 10 W. R. 396, the bequest was to all the children of testator’s daughter “who should be living at the time of her decease,” to be paid and become vested at twenty-one or marriage, but if such times for *payment* should happen in the lifetime of the testator’s daughter or of her husband, then after the

decease of the survivor of them : but nevertheless the shares of all and every such child to be vested and transmissible at twenty-one or marriage, although such respective times should happen before the death of such survivor :—*Held*, that a child who attained twenty-one, and died in the lifetime of testator's daughter, took an indefeasible vested interest. The learned judge (WOOD, V.-C.) founded his judgment on the fact that the will was contradictory, and that therefore "that construction would be put upon the will which provided for all the daughter's children at twenty-one or marriage."

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Para. (1).

A similar conclusion was arrived at by JOYCE, J., in *Re Simmons, Dennison v. Orman* (1903), 87 L. T. 594, where, after a life estate, the testator gave the life tenant a power of appointment among the children, with an ultimate gift over if there were no issue of the life tenant *living at the period of distribution*. His lordship held that there was an ambiguity, and proceeded thus : "Well, if there be an ambiguity, seeing that this second proviso was necessary in order to complete the dispositions in default of appointment, that clear words are required to cut down an interest once given, that property appointed under a power of appointment is *prima facie* for most, if not for all, purposes taken out of the settlement, and the case being one in which we are entitled to consider the inconvenience (see *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66), I think upon principle that this second proviso was not intended, and ought not to be construed so as to displace, defeat, or affect, estates or interests created by deed in exercise or execution of the previous power of appointment."

In *Re Colbold, Colbold v. Lawton*, [1903] 2 Ch. 299, the Court of Appeal laid it down broadly, that "it is now a well settled principle, that where there is a gift by will to A. for life, and after his death to his children, in terms which give the children an absolute interest in A.'s

Gift over on death "with out leaving children construed to refer only to children who

**Art 54.****Para. (1).**

have not  
attained  
vested  
interest.

lifetime, followed by a gift over if A. dies *without leaving* children, the word leaving is so to be construed as not to destroy any prior vested interest : that is to say, ‘without leaving children,’ should be read as without leaving children who have not attained vested interests. And this principle is not affected by the circumstance that the testator knew of the existence of a child of A., and that such knowledge appeared on the face of the will itself.” See also *Trecharne v. Layton* (1874), L. R. 10 Q. B. 459, and *Re Bradbury, Wing v. Bradbury* (1904), 73 L. J. Ch. 591).

**PARAGRAPH (2).**

Where gift  
not ambiguous  
effect  
must be given  
to divesting  
clause.

But where “payable” or similar expressions are not open to a double meaning, effect must be given to them. Thus in *Bright v. Rowe* (1834), 3 My. & K. 316, if the fund “became payable” before the children attained twenty-one or married, it was to be kept for them : in case any died before it “became payable,” it was to go over. There (as pointed out by PARKER, V.-C., in *Re Yates Trusts* (1852), 16 Jur., at p. 80) the word “payable” could have only one meaning with reference to the fund being set at liberty by the death of the tenant for life. “It was impossible on that instrument to take the word as having two meanings.” See also *Swallow v. Binns* (1854), 1 Kay & J. 417 (a case of a voluntary settlement); *Re Ball, Slattery v. Ball* (1888), 40 Ch. D. 11 ; and *Re Goulder, Goulder v. Goulder*, [1905] 2 Ch. 100, where a gift over to take effect on bankruptcy “before actual payment” was construed literally.

Nevertheless, in all such cases the divesting clause will be construed with the greatest strictness, and will only be allowed to take effect where the divesting contingency has been exactly fulfilled, as will be evident from the following cases :

Except con-  
tingency must  
happen to  
make divest-  
ing clause  
effective.

A testator declared that if his grandson, H. S. S., “should get married and die leaving no legitimate children,” then certain property given to him should

become the property of a third party. H. S. S. never married:—*Held*, that the gift over did not take effect. JOYCE, J., said that the clause was a purely divesting clause purporting to take away from H. S. S. property which was given to him in fee. In his lordship's opinion, where there was a divesting clause upon a contingency, it could not take effect unless the exact contingency happened. If he were to say that the divesting clause in this case ought to operate upon the happening of a part only of the contingency (viz., death without issue), he would be making a new will for the testator which he was not entitled to do (*Re Searle, Searle v. Searle*, [1905] W. N. 86).

Art. 54.

Para. (2).

A testator gave a life interest to his daughter with a divesting condition if she should in any way associate, correspond, or visit with any of his wife's nephews or nieces or their husbands or wives respectively, or if she should to the knowledge of his trustees entertain or exercise hospitality to them, or in any way contribute to the maintenance of any house in which they or any of them resided, or were or should at any time be entertained or received as visitors or guests:—*Held*, that the condition was void for uncertainty, as the daughter could not predicate with certainty what she might or might not do. The learned judge (FARWELL, J.) remarked that such limitations are regarded with great jealousy, and were construed with great strictness, and that it was a clear principle that the contingency on which such a limitation was to take effect should be something definite (*Re Jeffreys, Jeffreys v. Jeffreys* (1901), 84 L. T. 417).

Divesting  
clause void  
for uncer-  
tainty.

In *Re Greenwood, Sutcliffe v. Gledhill*, [1901] 1 Ch. 887, a legacy was to be held in trust to pay the income to A. for life "or until he attempts to alien, charge, or anticipate the same, or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the

Divesting  
clause on  
attempted  
alienation  
construed  
strictly.

**Art. 54.**

Para. (2).

same or any part thereof," and then over to B. A judgment creditor of A. served the trustees with a garnishee order on *accrued income* in their hands :—*Held*, that the order did not operate as a forfeiture of A.'s life interest, and FARWELL, J., said : " First of all we must bear in mind that the courts do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words, unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present. In my opinion, the true meaning of these words—and they are the only words really material to the present case—'or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof' is if he were deprived of the right to receive the same or any part thereof *on the day it becomes due*." See also *Re Sampson*, *Sampson v. Sampson*, [1896] 1 Ch. 630 ; *Re Stutz's Will* (1854), 4 D. M. & G. 404 ; *Sutton, Carden & Co. v. Goodrich* (1899), 80 L. T. 765 ; and *Durran v. Durran* (1904), 91 L. T. 187, affirmed 91 L. T. 819. *Bates v. Bates*, W. N. (1884), 129, is *contra*, but was disapproved in *Re Greenwood*, *Sutcliffe v. Gledhill*, *supra*, and in *Sutton, Carden & Co. v. Goodrich*, *supra*.

On the other hand, where there is a gift over of a life interest on attempted alienation or charging, the fact that a charge is given inadvertently, and is subsequently cancelled, will not prevent the gift over from taking effect (*Re Baker*, *Baker v. Baker*, [1904] 1 Ch. 157) ; and the presentation of a petition in bankruptcy by the life tenant is an attempted alienation within the meaning of such a condition (*Re Cotgrave*, *Myuors v. Cotgrave*, [1903] 2 Ch. 705).

Gifts over on marriage with a member of a specified

In *Chapman v. Perkins*, [1905] A. C. 106, a testator had declared that if any son or daughter should (*inter*

*alia*) "contract any marriage forbidden by me," viz., marriage with a person of any degree of kindred unless more remote than a third cousin, or if a daughter should marry without the consent of his trustees, his or her share in his estate should determine and be held upon certain specified trusts. After the date of the will one of the testator's daughters married a first cousin some eighteen years before the testator's death:—*Held*, that it not being clear that the will referred to marriage with a cousin in the testator's lifetime, it must be construed that the gift over only took effect in the event of such marriage after his death.

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Para. (2).

class refers only to marriage after testator's death.

On similar grounds, where there is a gift over on marriage without consent (which is a good condition, *Re Whiting's Settlement*, *Whiting v. De Rutzen* (1904), 52 W. R. 653), yet the consent once given cannot be capriciously and unreasonably recalled (*Re Brown, Inghall v. Brown*, [1904] 1 Ch. 120). And moreover the consent will be presumed from conduct, even where it is not expressly given (*Merry v. Ryves* (1757), 1 Eden, 1).

Gift over on marriage without consent.

A testator directed his executor to set aside £200 and thereout pay his widow £3 monthly so long as she remained unmarried, or until the £200 became exhausted, the said payment to cease on the wife marrying again. The widow died unmarried before the fund was exhausted:—*Held*, that her executrix was entitled to the balance as the exact contingency on which alone the fund was given over (viz., remarriage) never happened (*Re Howard, Taylor v. Howard*, [1901] 1 Ch. 412; following *Rishton v. Cobb* (1839), 5 My. & Cr. 145).

Gift of a sum payable by instalments until marriage not divested by death.

On similar principles, where there is a legacy to A., but if he dies in the testator's lifetime to B., and the testator and A. die simultaneously (*e.g.*, in the same accident), the gift over will not take effect, for the exact contingency has not happened (*Abbott v. Smith* (1883), 22 Ch. D. 236). So where a divesting clause gives property to A. in one

Death of testator and legatee simultaneously, where gift over on death in testator's lifetime.

**Art. 54.**

Para. (2).

Gifts over merely to substitute issue of a deceased donee not construed so strictly.

event and to B. in another, and both the contemplated events happen contemporaneously, the original gift will not be divested (*Ormerod v. Riley* (1866), 12 Jur. (N.S.) 112).

It would seem, that where the gift over is merely by way of substituting the issue of a deceased donee for that donee, there will not be the same tendency to decide against the divesting clause. At all events the recent case of *In re Maunder, Maunder v. Maunder*, [1903] 1 Ch. 451, in the Court of Appeal, appears to the present writer to show that this is so. There, residue was given upon trust for the testatrix's son for life, with remainder for his widow for life, and after the death of the widow "to divide" the *corpus* among all the son's children. And in the event of either of her grandchildren "dying before becoming entitled to any share," she directed that the child or children of any such deceased grandchild should take the parent's share; or if there should be no such child or children, then that such share should vest in all her surviving grandchildren. The testatrix left her son R. and eight grandchildren, his sons and daughters, her surviving. Here the word "entitled" might have been read as meaning "entitled in interest" so as to minimise the divesting clause. Yet it was held that the word "entitled" meant "entitled in possession," and that the substitutionary clause was operative, and might take effect at any time during the subsistence of the prior life estate, and that consequently the shares of the grandchildren were not indefeasibly vested, but were liable to be divested at any time during the prior life tenancy. The MASTER OF THE ROLLS in giving judgment said that the testatrix directed that, after the death of the son's wife, the residue is to be divided "amongst all the children of my said son," which would include children born after the death of the testatrix, and that this showed that the words "dying before becoming entitled" could not mean only dying before the testatrix, but must mean dying during the life of the tenant for life. This case shows how carefully

the words of a will must be scrutinised before applying the above rule. In the court below, [1902] 2 Ch. 875, **JOYCE, J.**, treated *Commissioners of Charitable Donations v. Cotter* (1840), 1 Dr. & W. 498, as no longer law, and as inconsistent with *Re Gregson* (1864), 2 De G. J. & S. 428, and also distinguished the case from *Re Crosland, Craig v. Midgley* (1886), 54 L. T. 238.

**Art. 54.**

Para. (2).

**ART. 55.** *Absolute Gifts subsequently Directed to be held in Settlement.*

(1) Where an absolute interest is once given, but by a subsequent provision it is partially divested so as to give interests to others, then, if and so far as such interests fail to take effect, the original vested interest remains absolute.

(2) Where there is an absolute gift, cut down by a superadded direction that it is to be settled upon the donee for life with remainder to his issue, then if the gift to the donee fails his issue will not take unless, taking the will as a whole, a share of the estate was settled, as distinguished from the share of the donee.

PARAGRAPH (1).

This principle usually known as the rule in *Lassence v. Rule in Tierney* (1847), 1 Mac. & G. 551, is well exemplified by the more recent case *Hancock v. Watson*, [1902] A. C. 14. There a testator directed his estate to be divided into five portions and then said "to S. D. I give two of such portions." He then directed that the two portions given to S. D. should remain in trust for her for life, and after her decease for her children upon attaining twenty-five if

**Art. 55.****Para. (1).**

sons, or upon attaining twenty-one or marrying in the case of daughters, "but in default of any such issue" there was a gift over to the children of C.: *Held*, that the limitations after the life estate to S. D. being void for remoteness, the original gift to her remained intact and passed to her representatives and did not go to the testator's next of kin under a partial intestacy. Lord DAVEY said: "In my opinion it is well settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted and imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin, as the case may be. Of course, as Lord COTTENHAM has pointed out in *Lassence v. Tierney* (1849), 1 Maen. & G. 551, if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to S. D. was in terms an absolute gift to her. The testator uses the words 'I give' and speaks of the shares subsequently as 'allotted' to her. Mr. Levett contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said; he has directed that during her life she shall have only the income of *her share* for her separate use without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death, so far as it should not be exhausted by the trusts declared of it, and with the right of her representatives to claim it. In other words, as between herself and the estate, there is a complete severance and disposition of her share so as to

exclude an intestacy, though as between herself and the parties taking under the engrafted trusts she takes for life only." See also *Kellett v. Kellett* (1868), L. R. 3 H. L. 160.

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Para. (1).

So where there is a gift to A. for life with remainder to his children, with a proviso that if any child dies in A.'s lifetime then the property shall go to the issue of that child, the original gift to a child of A. remains absolute if he dies in A.'s lifetime *without issue* (*Smither v. Willock* (1803), 9 Ves. 233; *Hodgson v. Smithson* (1857), 8 D. M. & G. 604). Similarly where there is a devise to A. in fee, with an executory limitation over to B. *for life* if A. dies without issue, the fee remains in A., subject to letting in B.'s life estate (*Gatenby v. Morgan* (1875), 1 Q. B. D. 685).

Gift over to issue of legatee on death before specified period does not take effect if legatee dies without issue.

Again, a bequest to several, or to a class, "or to such of them as shall be living at" the period of distribution or any other specified time, is a vested gift to all, subject to being divested for the benefit of those living at the time indicated. Consequently, if *none* survive, the original vested gift will remain intact, and all will be held to have taken as tenants in common (*Browne v. Lord Kenyon* (1818), 3 Mad. 410; *Sturges v. Pearson* (1819), 4 *ib.* 411; *Bell v. Slack* (1836), 1 Kee. 238; *Re Sanders's Trusts* (1866), 1 Eq. 675; *Marriott v. Abell* (1868), 7 Eq. 478). A testatrix bequeathed all her estate except two specified sums, to her sister B., and added the words "I would wish my money to be divided in equal shares after my sister's death, between my sister G. and my niece H., *should they survive her*." G. and H. both predeceased B.; —*Held*, by the Court of Appeal in Ireland, that B. took an absolute interest which, though liable to be divested if G. and H. survived her, became indefeasible on her surviving them (*Monck v. Croker*, [1900] 1 L. R. 56).

Gift to a class or such of them as shall survive A. goes to all if none survive A.

So, in *Crozier v. Crozier* (1873), 15 Eq. 282, a testator had given all his residue to his wife, "and after her death

**Art. 55.** to be equally divided to the children, should there be any." There were no children, and the court held that the wife took absolutely.

Initial difficulty in all these cases is to determine whether the gift over is a divesting gift or a gift in remainder.

In all these cases, however, the initial difficulty must be borne in mind of determining whether, on the true interpretation of the instrument, there really was *an absolute gift* afterwards partially divested, or whether all that the legatee was intended to take was the restricted interest. Of course, where the gift is by a will, and the partial divesting is by a codicil, there is no difficulty (*Norman v. Kynaston* (1860), 3 D. F. & J. 29); nor where, as in *Hancock v. Watson*, *supra*, there are clear words of gift and allotment. But there are numerous cases on the border line which nothing but verbal criticism of the particular instrument will solve; and, as was said in *Lassence v. Tierney* (1849), 1 Mac. & G. 551, "in the case of a will containing such a disposition, the intention of the testator is to be collected from the whole will, and not from words which, standing alone, would constitute an absolute gift. And in this connection, in doubtful cases, the subsequent disposition of the subject-matter of the gift in every possible event which can arise, forms an important consideration in putting a construction on the instrument; such a disposition being apparently inconsistent with the intention of giving an absolute interest in the first instance." Examples will be found in *Rucker v. Scholefield* (1862), 1 H. & M. 36; *Gompertz v. Gompertz* (1847), 2 Ph. 107; *Re Richards, Williams v. Gorrie* (1884), 50 L. T. 22; *Waters v. Waters* (1857), 26 L. J. Ch. 624; and *Harris v. Newton* (1877), 46 L. J. Ch. 268.

#### PARAGRAPH (2).

Gifts absolute in form with a superadded direction to settle on the donee for life with remainder over.

Where on the true construction of a will, the court comes to the conclusion that there was in the first instance an absolute gift, subsequently cut down by a direction to settle on the donee for life only with remainders over,

then if the gift to the absolute donee lapses, the remainders lapse with it. In such cases there is no *substitution* of issue for parent. All that is done is (1) to give a legacy to A. and then direct that the legacy so given is to be subject to trusts in favour of A. for life with remainder to his issue. Consequently, the rules as to alternative gifts (*Infra*, p. 310 *et seq.*) have no application, and the question whether the issue will take depends upon whether, taking the will as a whole, it can be construed as a settlement of a *share of the testator's estate* on the original legatee for life, with remainder to his issue, as a direct gift, or only as a settlement of *the share of a person who shall outlive the testator*. In the former case the issue will take as direct legatees, notwithstanding the death of their parent in the testator's lifetime: in the latter case they will not (*Re Speakman*, *Unsworth v. Speakman* (1876), 4 Ch. D. 620; *Re Roberts*, *Tarleton v. Bruton* (1885), 30 Ch. D. 234; *Re Pinhorn*, *Moreton v. Hughes*, [1894] 2 Ch. 276). In the last of these cases the testator directed his trustees to stand possessed of his residuary estate in trust for his four sisters (among them) in equal shares; "provided always and I hereby declare that my trustees shall retain the share of each of my sisters" upon trust for her for life, with remainders in favour of her issue:—*Held*, that the one-fourth share of a sister who predeceased the testator leaving issue, did not lapse but went to the issue as direct legatees. CHITTY, J., distinguished the case from *Re Roberts*, *Tarleton v. Bruton*, *supra* (where the decision was *contra*), on the ground that there the gift was followed by a provision, that in case any of the named legatees should die under twenty-one, his or her share should go to the others of them, so that if one had died under twenty-one leaving children, the children could not have taken. His lordship said: "The key of the judgment, I think, which I do not consider it necessary to read at length, is to be found in what Lord Justice LINDLEY said: 'You cannot read it as a settlement of quarter, but as a settlement of

Art. 55.

Para. (2).

**Art. 55.** the share which the niece takes.' That appears to me to be a cardinal distinction between that case and the one I have to deal with." See also COZENS-HARDY, J., to same effect in *Re Powell, Campbell v. Campbell*, [1900] 2 Ch. 525, and also *Re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66.

Para. (2).

Where the primary gift is to a *class*, with a direction to settle the shares of each member of the class, the difficulty of saving the shares of a person who dies before the testator (and who, therefore, never formed one of the class), for such person's issue, is accentuated. See *Stewart v. Jones* (1859), 3 D. & J. 532.

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ART. 56.—*Divesting Provisions not extended to  
Accrued Shares.*

Provisions in a will or settlement divesting the shares of beneficiaries dying before a specified event, do not *primâ facie* extend to shares which have accrued under the same provisions, so as to divest them twice. Nor are such accrued shares, *primâ facie*, subject to any of the trusts or conditions affecting original shares.

Gifts over to survivors not subject to original trusts.

Thus "where a man gives a sum, suppose of £1,000, to be divided amongst four persons as tenants in common; and that if one of them die before twenty-one or marriage, it shall survive to the others; if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second's original share: for the accruing share is a new legacy" (*per* Lord HARDWICKE, *Pain v. Benson* (1744), 3 Atk. 80).

The rule is equally applicable to real estate as to personality. See *Giles v. Melsom* (1873), L. R. 6 H. L. 24. **Art. 56.**

Real estate.

Again, a testator directed his property to be divided between his children, the shares of daughters being settled upon themselves and their issue, with gifts over in default of issue to the testator's other children:—*Held*, that a share accruing to daughter A. by reason of the death without issue of daughter B., belonged to A. absolutely, and was not settled like her original share (*Ware v. Watson* (1855), 7 D. M. & G. 248; *Bright v. Roue* (1834), 3 M. & K. 316).

Settled shares of daughters.

But although the rule is as well settled as any rule can be, it is capable of being negated either expressly or by implication. All books of precedents give forms expressly negating it (*e.g.*, by directing the accrued shares to go over to the other children “in manner hereinbefore directed concerning the original shares.” In such case the accrued shares will be subject *ad infinitum* (*Re Hutchinson's Settlement* (1852), 5 De G. & Sm. 681) to the same trusts (including the accruer provision), as the original shares. See *Milson v. Audry* (1800), 5 Ves. 465; *Goodman v. Goodman* (1847), 1 De G. & Sm. 695; *Egry v. Marsden* (1838), 4 M. & Cr. 231; *Giles v. Melsom* (1873), L. R. 6 H. L. 24.

Rule capable of being negated.

The rule yields more easily to implied negation than most rules relating to divesting. Thus, although where in the divesting clause that which is given over is spoken of as the donee's “share,” that word will not include an accrued share (*Rickett v. Guillemard* (1841), 12 Sim. 88), yet where the words used are “share or shares,” or even “share and interest,” they will carry accrued shares. But it would appear to be *aliter* where there is a general divesting clause relating to a whole class where “his, her or their share or shares” is capable of being read as his share, her share, or their shares. See *Re Chaston*, *Chaston v. Scargo* (1881), 18 Ch. D. 218, and *Douglas v. Andrews* (1852), 14 Beav. 347.

Rule more easily negated than most rules as to divesting.

**Art. 56.**

So, again, where there is an ultimate gift over of the entire fund, or any other provision showing that the testator regards it as existing in an undivided state at the period of distribution, that will suffice to negative the rule (*Eyre v. Marsden* (1838), 4 M. & C. 231; *Sillick v. Booth* (1841), 1 Y. & C. Ch. 117, 739; *Doe v. Birkhead* (1849), 4 Ex. 110; *Leeming v. Sherratt* (1842), 2 Ha. 14; *Dutton v. Crowdy* (1863), 33 Beav. 272).

So, where in one part of the instrument there is a declaration that accrued shares shall be subject to the same provisions as original shares, the word "share" when used in a subsequent part of the instrument will be extended to accrued shares (*Re Hutchinson's Settlement* (1852), 5 De G. & Sm. 681; and see *Goodman v. Goodman* (1847), 1 De G. & Sm. 695).

A gift to several with benefit of survivorship will also carry accrued as well as original shares (*Re Cravhall* (1856), 8 D. M. & G. 480).

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## CHAPTER IV.

## SECONDARY RULES RELATING TO CONDITIONAL GIFTS, VIZ., TO GIFTS TO SURVIVORS, ALTERNATIVE GIFTS, GIFTS OVER ON DEATH SPOKEN OF AS A CONTINGENCY, AND CONDITIONS IMPOSED ON ERRONEOUS ASSUMPTIONS.

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ART. 57.—*Gifts to Survivors.*

(1) Where there are gifts to several persons, with a gift over of the shares of such of them as may die in certain contingencies (*e.g.*, without issue) to the *survivors* or *survivor*, these words are *prima facie* construed strictly.

(2) But where there is an ultimate gift over to third parties, which is only to take place in the event of *all* the donees dying in the contingencies referred to, then, unless *all* the shares, original and accrued, are settled, “survivors” may be construed “others,” so as to give the share of one who dies in the specified contingent circumstances, to all those who predeceased him, and who took interests under the will, as well as to those who actually survived him; for otherwise there might be an intestacy.

Art. 57.

(3) But where there is such an ultimate gift over, *and all the shares both original and accrued are settled*, the word “survivors” may be construed to mean all who survived actually in person or figuratively in issue.

(4) *Prima facie*, survivorship is to be referred to the period of distribution, unless the gift to survivors is to take place on the happening of some event, when it will *prima facie* be referred to the date when the event occurs.

## PARAGRAPH (1).

Survivors  
*prima facie*  
construed  
strictly.

The general rule that the word “survivors” is to be construed in its natural sense, was strongly affirmed by the House of Lords in *Inderwick v. Tatchell*, [1903] A. C. 120, and is well illustrated by the case of *Re Benn, Benn v. Benn* (1885), 29 Ch. D. 839, where the rule was adhered to, although it probably defeated the testator’s intention. There the testator gave specified estates to his seven children, respectively, for their respective lives, with limitations over to their respective children. Then followed this general clause: “And in case any or either of my said sons or daughters shall depart this life without leaving any children or child him her or them surviving, I give devise and bequeath the several estates and interests to which their children or child respectively would have been entitled under this my last will, if living, unto my *surviving sons and daughters* for the term of their respective natural lives; and after their deceases respectively then I give *their* respective shares unto *their* several and respective children their heirs executors administrators and assigns.” Charles Benn, one of the sons, died without ever having had a child. At his death there were living three of the testator’s children. The others had died in the lifetime of Charles, leaving children, and

the question for decision was to whom the estate devised to Charles for life belonged. COTTON, L.J., said, "surviving means living beyond *some* period. Now the rule for construing a will is, that if a rule has been laid down fixing, in the absence of any expressed intention, the meaning of a word, then that meaning is to be given to it, unless there is something in the context to vary the meaning; and if no such definite rule has been laid down, then the words are to be taken in their natural sense. There is no canon as to the period to which survivorship is to be referred, *except that in* an immediate gift, it is to be referred to the death of the testator, and if there is a life estate, then to the determination of the life estate (*a*). Here the natural meaning of 'surviving' is living at the death of the child, the estate devised to whom for life is given over on his death. . . . It is said that when all the shares are settled, and there is a general clause of accruer on the death of the tenant for life without children, the accrued shares being settled in the same way as the original shares, that is a sufficient indication of intention that 'survivors' means 'others.' I am not aware of any such rule. No doubt such a scheme of disposition tends in favour of the view contended for, *and when it is followed by a gift over in the event of all dying without issue, there is sufficient evidence of an intention not to use the word 'survivors' in its proper sense*; but whether a scheme of disposition of this kind, *without a gift over*, is sufficient evidence of such an intention, is a different matter. *Waite v. Littlewood*, (1872), 8 Ch. App. 70, was relied upon by the appellants, and the opinion of Lord SELBORNE is entitled to great weight, but in that case there was not only a settlement of the accrued shares, but a gift over. It is said that Lord STANBROSE did not rely on the gift over, but I do

**Art. 57.**

Para. (1).

(a) See *Chapman v. Watson* (1819), 4 Mad. 11, and *Re Duke of Hamilton's Trusts* (1889), 16 Ch. D. 112, as to personality; and *Re Belfast Town Council, Ex parte Sugden* (1884), 13 L. R. 11, 169, as to realty.

- Art. 57.** not collect that from his judgment. The settlement of the shares is no doubt important, but I think that he mainly relied on the gift over." This view of the importance of the gift over is supported by *Harrison v. Harrison*, [1901] 2 Ch. 136, and *Garland v. Smyth*, [1904] 1 I. R. 35. See also *Olphert v. Olphert*, [1903] 1 I. R. 326.
- Para. (1).**

### PARAGRAPH (2).

**Ultimate gift over in event of all donees dying without issue.** On the other hand, in *Lucena v. Lucena* (1877), 7 Ch. D. 255, a residue was given to the testator's children equally, the sons taking their shares absolutely, the shares of daughters being settled. Then there was a gift over of the shares of children dying under certain circumstances, to his surviving children in the same manner as was provided with respect to their original shares, and there was a gift over in case of the death of *all* his children without issue. It was held that there was enough to prevent the word "surviving" from having its natural meaning. The MASTER OF THE ROLLS (Sir G. JESSEL) held that surviving children meant those who survived actually in person or figuratively in issue taking an interest under the will. The Court of Appeal agreed with the MASTER OF THE ROLLS, that the word "surviving" was not to be taken in its strict sense, but considered that sons who did not survive, either personally or in issue, taking an interest under the will, were let in. The court said: "The fact of shares being settled, and the fact of the ultimate gift over being *only to arise in the event of a failure of all children and issue who are objects of the testator's bounty*," [which, if "survivors" was construed strictly, might have had the effect of causing an intestacy in the event of there being no *child* surviving, although issue of deceased children might] "are circumstances, each of which may properly be relied upon as showing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the

present case. If, *with the gift over standing as it does*, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is, that the circumstance of the shares of *some* of the children named in the will being settled, is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of survivors in person or in issue taking under the will, though *that would have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled.* . . . We think that 'surviving' must be construed 'other,' and that the personal representatives of the two sons who died before Mr. Inglis are entitled to share in the fund in question."

Art. 57.

Para. (2).

It will be perceived from a comparison of *Re Benn*, *Benn v. Benn*, and *Lucena v. Lucena*, *supra*, that the latter case did not infer that the mere fact of even all the shares being settled, would be enough to vary the natural meaning of the word "survivors," although it was held enough *when combined with an ultimate gift over*. The latter provision appears, therefore, to be essential. The settlement of the shares then becomes an additional factor in favour of a relaxation of the strict construction.

### PARAGRAPH (3).

It also seems from *Lucena v. Lucena*, *supra*, to have this further effect, viz., that if *all* the shares are settled, then "survivors" is restricted to those who survive actually in person or figuratively in issue. See *Re Wilham*, *Buchanan v. Hill*, [1901] 2 Ch. 169 (*b*) ; *Waite v. Littlewood* (1872), 8 Ch. App. 70 ; *Wale v. Varah* (1876), 2 Ch. D. 348. But if some only of the shares are settled, the word is not so restricted, but embraces

Where *all* the shares are settled, "survivors" may mean those who survive actually in person or figuratively in issue.

(b) In which JOYCE, J., dissented from *O'Brien v. O'Brien*, [1896] 2 L. R. 459.

**Art. 57.** *all the other members of the class taking under the will,*  
 Para. (3). *notwithstanding that they may have died without issue.*

Again, other expressions in the will may, of course, modify the natural meaning of "survivors" or similar words, for an example of which the reader is referred to *Re Blantern, Lowe v. Cooke*, W. N. (1891), 54, where the Court of Appeal pointed out that the true way to read a will is to form an opinion apart from the cases, and then see whether the cases require a modification of that opinion; and not to begin by considering how far it resembles other wills on which decisions have been given. And see to the same effect Lord HALSBURY in *Scale v. Rawlins*, [1892] A. C., at p. 343; *Kingsbury v. Walter*, [1901] A. C., at p. 188; *Inderwick v. Tatchell*, [1903] A. C., at p. 122; and *per* Lord COLERIDGE, C.J., in *Re Tippet and Newbould* (1888), 37 Ch. D., at p. 447.

Same principles equally applicable to deeds as to wills.

The principles above enunciated as to wills, appear to be equally applicable to the construction of settlements by deed. See *Doe d. Watts v. Wainewright* (1793), 5 T. R. 427, and *Cole v. Sewell* (1848), 2 H. L. Cas. 186; *Re Friend's Settlement, Cole v. Allcot*, [1906] 1 Ch. 47.

As to *substitutional* gifts to survivors, see *infra*, p. 310, *et seq.*

#### PARAGRAPH (4).

Survivorship usually referable to period of distribution.

"I cannot help saying that the word 'survivor' is a word which requires a context. Survivor of whom? Survivor when? Those are both categories of thought which must be supplied in order to give the word 'survivor' any meaning at all. It may mean the survivor of the testator; it may mean the survivor at the time of some event contemplated by the will which is being discussed; and what it is must be found out by reference to the context" (*per* Lord HALSBURY: *Inderwick v. Tatchell*, [1903] A. C., at p. 123).

"If there is no previous interest given in the legacy, then the period of division is the death of the testator, and

the survivors at his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at that death will take the whole legacy" (*Cripps v. Wolcott* (1819), 4 Madd. 11; and as to real estate, *Re Gregson* (1864), 2 D. J. & S. 428). **Art. 57.**  
Para. (4).

On the other hand, a gift to several at twenty-one or to the survivors (*Forrester v. Smith* (1852), 2 Ir. Ch. 70), or to several with a gift to the survivors on death without issue (*Bowers v. Bowers* (1869), 5 Ch. App. 244) goes to those living at the happening of the contemplated event: viz., in the first case, to the survivors when one of the legatees dies under twenty-one, and in the other case, to the survivors when he dies without issue. Exceptions.

The present writer, however, considers that it is impossible to extract any principle from the decisions, which almost all turn on the particular language of the will. In particular, the cases run extremely fine where there is a life tenancy. Thus, a gift to A. for life with remainder to B., C., and D. or the survivors or survivor of them is a gift to such of them as survive A. But if the gift be expressed to be given to A. for life and after his death to B., C., and D., but if any of them die before A., then to the survivors or survivor of them, this may be interpreted as giving the share of one who dies to those living *at his decease*. See *Scurfield v. Howes* (1790), 3 B. C. C. 90; *White v. Baker* (1860), 2 D. F. & J. 55; but *cf.* *Cambridge v. Rous* (1858), 25 Beav. 409; *Re Pickworth, Smith v. Parkinson*, [1899] 1 Ch. 642; and see Theobald on Wills, 6th ed., pp. 653—659, where the cases are fully discussed.

## Art. 58.

ART. 58.—*Gifts to take effect on Death spoken of as a Contingency.*

(1) Where a gift is given to take effect on death spoken of as a contingency, it will be construed to mean on death before the period of distribution: *i.e.*, where the gift is immediate, death before the testator, or where the gift is in remainder, death before the expiration of the particular estate. In such cases, therefore, the gift will be substitutional.

(2) Where, however, death is coupled with some other event which may be contingent, then the rule does not apply: *e.g.*, a gift to A., with a gift over to B. in the event of A. dying *without leaving issue*, the contingency *prima facie* refers to the double event of death *plus* failure of issue. In such cases, therefore, the gift over is an executory limitation to take effect in the contingency of A. dying at any time without issue.

## PARAGRAPH (1).

Death spoken of as a contingency must refer to death within some limited period.

Where there is a gift to A., *and if he shall die*, to B., if the words were read literally there would be a gift over in an event not contingent but certain, and in order to avoid the repugnancy of an absolute giving and an absolute taking away, the court is forced to read the words “if he shall die” as meaning if he shall die before the interest vests (*per* Lord CAIRNS: *O'Mahoney v. Burdett* (1874), L. R. 7 H. L. 338).

## PARAGRAPH (2).

*Aliter*, where the contingency is not confined to death simply.

But where the gift is to A., and, if he shall die *without children*, to B., there the event spoken of is not a certain, but a contingent event, and it would be importing a

meaning, and adding words to the will, if it were to be construed to import as a condition which was to entitle B. to take, that the death of A. without children must happen before some particular period. In these cases, therefore, it is held that if *at any time*, whether before or after the death of the testator, A. should die without leaving a child, the gift over takes effect, and the legacy vests in B. (*ibid.*).

**Art. 58.**

Para. (2).

At one time it was considered that where a legacy was given to A. for life, with remainder to B., but if B. should die without leaving a child (or unmarried or under twenty-one), then over, the death of B. referred to his death in the lifetime of the tenant for life. This presumed rule (known as the 4th rule in *Edwards v. Edwards* (1851), 15 Beav. 357) was, however, overruled in *O'Mahoney v. Bardett*, *supra*, where the House of Lords decided that, *prima facie*, the death in such cases means death without a child (or unmarried, or under twenty-one) *at any time*, whether in the tenant for life's lifetime or afterwards. As was pointed out, however, by Lord CAIRNS, the question is one which depends on the words of the particular will, and although the rule is *prima facie* as above stated, yet there are many circumstances which may have the effect of restricting the death to the period of the life tenancy; *e.g.*, a direction to the trustees to assign and transfer to B. upon the death of the life tenant; a direction that from and after the death of the life tenant the legacy is to be at B.'s own disposal, followed by gifts over in alternative events, one of which must happen; a direction that the donee under the gift over shall take the same share as B. would have taken "if then living"; a gift to B. when he shall attain twenty-one, and, in case he shall die leaving a child or children, then to such child (*Home v. Pillans* (1833), 2 My. & K. 15; explained in *Re Schnadhorst, Sandlohl v. Schnadhorst*, [1902] 2 Ch. 234); and the like. See also *Ingram v. Soutten* (1874), L. R. 7 H. L. 408.

Obsolete rule that death without issue spoken of as a contingency, related to death before the period of distribution.

## Art. 59.

ART. 59.—*Alternative Gifts, Original and Substitutional.*

(1) An alternative gift to issue contingently on the parent dying before a particular date, is either substitutional or original. It is substitutional when the share which the issue are to take is by a prior clause given to the parent. It is original when there is no such prior gift (c).

(2) It is essential to the validity of a substitutional gift that the substituted donee should survive the person for whom he is substituted. But where the gift is original this is not essential.

(3) An original alternative gift to issue does not fail by reason of the death of the parent in the testator's lifetime, even although he was dead at the date of the will. But it may fail altogether where the original donee, although dying before the testator, lived long enough to destroy the contingency on which alone the issue were to take.

(4) A substitutional gift to issue where the parent is a named individual, does not fail by the latter's death in the testator's lifetime, even although he was dead at the date of the will. But where the parent was one of a class, then *primâ facie*—

(a) it will fail if the parent was dead at the date of the will ;

---

(c) See *per* KINDERSLEY, V.-C. : *Lauphier v. Buck* (1865), 2 Dr. & Sm. 484, 494.

Art. 59.

(b) it will fail if he died between the date of the will and the death of the testator, if a life interest is interposed between the death of the testator and the enjoyment of the alternative gift;

(c) it will not fail if he died between the date of the will and the death of the testator, if the alternative gift is to take effect immediately.

(5) Whether the gift be original or substitutional, contingencies and incidents annexed to the gift to the parent will *prima facie* not attach to the alternative gift to the issue.

(6) In an alternative gift to parents or issue, the class of issue to take is *prima facie* ascertained as follows :

(a) If the gift to issue is original, the class consists of those living at the death of the testator ;

(b) If the gift is substitutional, the class consists of those living at the death of the survivor of the testator and the person for whom they are substituted, plus, in both cases, issue subsequently born before the period of distribution.

(7) Where there is (at all events in a deed) a gift to two alternative classes *as joint tenants* each class is exclusive of the other. But (*semble*) in other cases *prima facie* the issue of each parent will be substituted for such parent although other members of the class of parents still survive.

#### PARAGRAPH (1).

" A gift to issue is substitutional when the share which the issue are to take is by a prior clause expressed to be

Where gift to issue substitutional and where original.

**Art. 59.**

Para. (1).

given to the parent of such issue : and a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent " ( *per* KINDERSLEY, V.-C. : *Lauphler v. Buck* (1865), 2 Dr. & Sm. 484, 494 ; *King v. Cleaveland* (1859), 4 De G. & J. 477, 487 ; *Martin v. Holgate* (1865), L. R. 1 H. L. 175 ; *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206).

Word "or" instead of "and" not conclusive.

The copulative word "and" instead of "or" does not necessarily render the gift to issue an original gift ( *per* JAMES, L.J., in *Hurry v. Hurry* (1870), 10 Eq. 346, 348). Nor does the disjunctive word "or" necessarily import that the gift is substitutional. The only true test is whether any prior gift is given to the parent.

Gift to class living at period of distribution or issue of those then dead is an original gift to the issue.

Thus, in *Re Woolley, Wormald v. Woolley*, *supra*, the gift was to divide among the testator's grandchildren *living at the period of distribution or the issue of such (i.e., grandchildren) as might be then dead* : — *Held*, that the gift to issue of deceased grandchildren was original and not substitutional as there was no prior gift expressed to be made to any grandchild who was not living at the period of distribution, and that consequently in the gift to issue of deceased grandchildren, such issue was not substituted for them.

Gift to children or their legal representatives original gifts.

A testator gave a share of residue to each of his daughters for life, and directed that after their deaths their respective shares were "to be divided between their respective children *or* legal representatives" : — *Held*, that these were two alternative original gifts, viz., (1) to children, if any ; but if none then (2) to the legal representatives of the daughter, and that consequently no question arose as to the law applicable to substitutional gifts (*Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200). It seems to the present writer almost impossible to reconcile this case and that of *Re Ibbetson, Ibbetson v. Ibbetson* (1902), 88 L. T. 461. There a testator by will, dated in 1877, gave all his real and personal estate to his wife for

life, and at her death to his two sons, to be divided between them in equal shares. And at their death their or his portion or portions, if married, were given to their or his child or children *or their heirs*. Testator survived his wife and died in 1890. One son J. died in 1895 leaving one living son and having had a daughter who died in 1888 leaving a son S. born in that year :—*Held*, that the latter (S.) was not substituted for his deceased father ; because the daughter was only one of a *class* and died before the testator, and therefore never could have taken herself, nor was the gift to the sons an original gift.

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Para. (1).

In considering gifts to parents and issue, it must always be borne in mind that such gifts are not necessarily alternative at all, but may be construed to be successive. For instance, where there is an absolute gift to sons on attaining twenty-one, with a proviso that the share of any son dying without issue shall go to the other sons, such a disposition may have a different meaning in different wills. It may be intended to take effect by substitution, or it may be intended to take effect by way of a reversionary limitation. The intention of the testator may have been to give the legacy to each son, with an executory limitation over in the event of the son dying *at any time* without issue ; or it may have been to *substitute* the issue in place of a son who should happen to die *before the period of distribution*. In the first case, a son who survived the testator would take a vested interest liable to be divested in the event of his dying without leaving issue (or, since the Conveyancing Act, 1882, without having had issue who lived to attain twenty-one). In the second case, if he survived the period of distribution, he would take absolutely. In the first case, if he died before the testator, without issue, a question would arise as to whether the legacy did not lapse. In the second case no such question could arise, as the other sons would be substituted as legatees. See judgment of TURNER, L.J. : *Ware v. Watson* (1855), 7 D. M. & G., at p. 258. In short, an

Gifts to  
parents and  
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successive.  
Difficult  
question to  
determine  
when a gift  
is substit-  
utional.

**Art. 59.****Para. (1).**

alternative legacy or devise, viz., to A. if living, but if not, to B., differs essentially from a gift to A. with an executory gift over in certain events.

Gift may be either absolute or substitutional according as it is of real or personal estate.

Moreover, a gift may be an absolute gift or a substitutional one according as the property is real or personal. Thus, a gift of freehold land to A. *or* his heirs, gives A. the fee simple if he survives the testator, and nothing to his heirs if he does not; but a similar gift of personal estate would be a gift to A. if he survived the testator or to his heirs if he did not (*Re Ibbetson*, *Ibbetson v. Ibbetson* (1902), 88 L. T. 461; *Reed v. Snell* (1743), 2 Atk. 645). As to a gift of land to A. or the heirs of his body conferring an estate tail, see *Harris v. Davis* (1844), 1 Coll. 416; *Greenway v. Greenway* (1860), 2 De G. F. & J. 128. In such a case it is conceived that s. 32 of the Wills Act would prevent a lapse.

## PARAGRAPH (2).

Substitutional legatee must survive the person for whom he is substituted.

The most important distinction between original and substitutional alternative gifts is, that it is essential to the validity of the latter that the substituted issue should survive the parent for whom they are substituted, whereas there is no similar qualification required where the alternative gift to issue is original.

As KINDERSLEY, V.-C., put it in *Lauphler v. Buck* ((1865), as reported in 34 L. J. Ch. 650, 657, approved by JOYCE, J., in *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206, 209): "I conceive that the true rule upon principle that ought to be applied is this: that if the gift be an original gift to issue, they need not survive the parent, but if it be a gift by substitution, then they must survive the parent in order to be substituted for the parent."

Thus a gift to A. for life with remainder to his children; but if any child be then dead then his intended share

to go to his issue, being a substitutional gift, only such issue can take as survived the deceased parent. But if the gift had been to A. for life with remainder to *such* of the children of A. as shall be then living, and the issue *per stirpes* of such of his children as shall be then dead, that would have been an original gift to the issue, and all of them who survived the testator would take a share although they may have died before their own parent, there being nothing to show that the contingency of being alive at the period of distribution annexed to the gift to the parent applied to the alternative gift to his issue (as to which see *infra*, p. 318).

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Para. (2).

## PARAGRAPH (3).

Where an alternative gift is original and not substitutional it is obvious that the death of the parent in the testator's lifetime cannot make the gift to the issue lapse; for, *ex hypothesi*, nothing was given to the parent. Moreover, for the same reason such gifts are not vitiated because the parent was dead at the date of the will. Thus where the gift is to a class "then living, and the issue of such of them as may be then dead," the issue of those dead at the date of the will take as direct and original members of the class, and not by way of substitution (*Tytherleigh v. Harbin* (1835), 6 Sim. 329; *Heaseman v. Pearce* (1871), 7 Ch. App. 275).

Death of parent in testator's lifetime does not vitiate alternative gift to issue, whether it be original or substitutional.

On the other hand, in some rare cases, although the parent may die before the testator, he may nevertheless have lived long enough to destroy the contingency on which alone the issue were to take (whether as original or substitutional legatees). In such cases, if the parent be a named individual, there will be a lapse, and if he be one of a class he will drop out of it; and in either case the issue will take nothing, because in the event they have not been substituted for him. Thus a testator left his property in trust for his wife for life, and finally for such

*Aliter*, where parent has lived long enough to destroy the contingency on which the alternative gift is to take effect.

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Para. (3).

of his children as should be living *at the death of his wife*, and the issue of such *as should be dead*. The wife died in 1891; one of the children survived her and died in 1899; and the testator died in 1900:—*Held*, that the gift to the deceased child failed, as he died in the testator's lifetime; and that the alternative gift to his issue failed, as it was only to take effect if the parent had died before the testator's wife (*Re Kinnear, Kinnear v. Barnett* (1904), 90 L. T. 537). An analogous decision was arrived at in *McKay v. McKay*, [1901] 1 L. R. 109. There a testator had devised lands to trustees upon trust for his son D. and his heirs upon attaining the age of twenty-six; but if D. should die before attaining twenty-six, then in trust for testator's eldest son W. By a codicil he revoked the gift to D., and gave him a rentcharge instead, in full substitution for all interests to which his son or his heirs were entitled under the will. D. attained twenty-six in testator's lifetime:—*Held*, that W. took no interest in the lands, which fell into residue, because they were only given to him if D. failed to attain twenty-six, a contingency which had not happened. See also to like effect, *Aplin v. Stone*, [1904] 1 Ch. 543, where the original gift failed because the legatee witnessed the will, and the substitutional gift failed because the original legatee was alive at the period of distribution.

## PARAGRAPH (4).

Substitutional legacies do not lapse by death of original legatee where he is a named person.

With regard, however, to substitutional gifts, "it seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing v. Baine* (1731), 3 P. W. 113, legacies were given to children, payable at their respective ages of twenty-one; and if any of them died before that age, the legacy given to the person so dying to go to the

survivors. One having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors. The argument was, that the bequest over could not take place, as 'there can be no legacy, unless the legatee survives the testator; the will not speaking till then; wherefore this must only be contended where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one.' It was, however, held, and is now settled, that in such a case the bequest over takes place" (*Humberstone v. Stanton* (1813), 1 V. & B. 385).

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Para. (4).

Thus if there is a gift to A. for life, remainder to B. and C. equally, but if either die *before his share should become payable* without issue, his share is to go to the survivor: if B. dies in the testator's lifetime without issue his share does not lapse, but goes under the alternative, or substitutional bequest, to C. (*Humphreys v. Hoares* (1830), 1 R. & M. 639).

Instance of a substituted gift which does not lapse.

So where an individual is named in the will as original legatee, and it turns out that he was dead at its date, it is obvious that the testator either made the will on the hypothesis that he was alive, or under a mistake. In either case it is equally obvious that the testator intended the alternative gift to take effect, otherwise the will would be absolutely meaningless. In such cases, therefore, the substituted legatee takes notwithstanding that the original legatee was dead at the date of the will (*Montagu v. Nacella* (1826), 1 Russ. 165; *Re Dawes* (1873), 4 Ch. D. 210; *Re Miles, Miles v. Miles* (1890), 61 L. T. 359; *Ive v. King* (1852), 16 Beav. 46).

Original legatee dead at the date of the will.

But the reasoning in relation to an original named legatee dying in the testator's lifetime (whether before or after the date of the will) does not apply where there is a gift to a *class* with a substitutionary gift to their issue. In such cases there is nothing to show that the testator intended that a person who was dead at the date

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Para. (4).

of the will should ever be *included in the class*: indeed, his inclusion would be contrary to the principles enunciated in Art. 20, (*supra*, p. 105). Consequently, as such a person *could* not be an original legatee, *prima facie* his issue cannot take by substitution (*Re Webster*, *Webster v. Mello* (1883), 23 Ch. D. 737; *Christopherson v. Naylor* (1816), 1 Mer. 320; *Re Offiler*, *Offiler v. Offiler* (1900), 83 L. T. 758; *Re Gorringe*, *Gorringe v. Gorringe*, [1906] 1 Ch. 319).

Same considerations apply to substitutional gifts to issue of deceased members of a class where they die before becoming members of the class.

And similar considerations apply, where there is a gift to a class ascertainable at the death of the testator, but the enjoyment is postponed to let in a life interest with a substitutional gift to issue of deceased members of the class, and one of them dies after the date of the will, but in the testator's lifetime. For such person would never be a member of the class at all; and the language is consistent with the intention that only the issue of members of the class (*i.e.* persons who survived the testator) dying before the period of distribution should be substituted for their parents (*Re Hannam*, *Huddelsey v. Hannam*, [1897] 2 Ch. 39).

But it is otherwise where no life estate is interposed. As NORTH, J., said in the last cited case, "If there had been an immediate gift to take effect at the death of the testator, to his brothers and sisters, followed by a substitution of children of deceased's brothers and sisters for their parents, the *reference to children could only be to children of brothers and sisters who had died in the lifetime of the testator*, because there would be no other time to which it could be referred. In the present case that is not so; a previous tenancy for life is created."

## PARAGRAPH (5).

Death of the alternative legatee before the period of distribution.

Although the very nature of an alternative gift is, that the original legatee takes nothing if he fails to survive the stated period, that condition is not *prima facie* extended to the alternative legatee. Consequently, in the absence of

any intention to the contrary, the latter legatee will take, although he also dies within that period. This was distinctly decided by the House of Lords with regard to alternative *original* gifts in the often cited case of *Martin v. Holgate* (1865), L. R. 1 H. L. 175. But the learned lords in that case seem to have doubted whether the same rule was applicable where the gift is substitutional. In particular, Lord CHELMSFORD said (p. 187), "Where a gift is substitutional, it may much more easily be presumed that a contingency on which the original gift depends is intended to be applied to the gift which comes in its place, than in the case of the original and independent gifts." However, modern decisions have laid it down that the same principle is equally applicable to substitutional as to original gifts. Thus, in *Re Bradbury, Wing v. Bradbury* (1904), 73 L. J. Ch. 591, the proceeds of residuary estate were to be held upon trust to pay the income to testator's wife for life, and after her death to transfer to his younger daughter D., but if she should be then dead, to transfer the same to any child or children of hers, and "failing such issue" there was a gift over :—*Held* (the widow, D., and children of D. being all in existence), that the gift over never could take effect. For if D. outlived the widow she would take absolutely, and if she did not, then her children would take, whether they survived the widow or not. See also *Re Ball, Slattery v. Ball* (1888), 40 Ch. D. 11.

Somewhat analogous is the case where the first gift is to a class *as tenants in common*, with substitutional gifts to the issue of any one of the original class who may die before the period of distribution. In such cases the issue take as joint tenants in the absence of words of severance (*Re Jones, Hume v. Lloyd* (1878), 47 L. J. Ch. 775; *Re Battersby's Trusts*, [1896] 1 L. R. 600; and see also *Re Turner* (1854), 34 L. J. Ch. 660; *Re Flower, Mattheson v. Goodwyn* (1890), 62 L. T. 677). This principle, however, is not applicable where the gift is to several (or to a class)

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Para. (5).

Gifts to a  
class with  
substitu-  
tional gifts  
to their  
issue.

**Art. 59.** or the survivors or survivor of them. In such cases,  
 Para. (5). if none survive the period of distribution, there is no substituted legatee, and the original gift remains in full force (*Marriott v. Abel* (1869), 7 Eq. 478; *Re Saunders* (1865), 1 Eq. 675; *Hodgson v. Smithson* (1856), 8 D. M. & G. 604; and see *supra*, p. 293).

#### PARAGRAPH (6).

When alternative legatees are a class (*e.g.*, issue), the class is ascertained differently according as the gift is original or substitutional. If it be substitutional, the class consists of all who are in existence when the substitution takes place (*i.e.*, at the death of the survivor of the testator and the original legatee), *plus* all who subsequently came into existence before the period of distribution (*Ive v. King* (1852), 16 Beav. 46; *Re Jones, Hume v. Lloyd, supra*; *Re Sibley* (1877), 5 Ch. D. 494). But if the gift is original, then the class consists of those living at the death of the testator (whether they survive the original donee or not) plus those subsequently coming into existence before the period of distribution (*Re Smith's Trusts* (1878), 7 Ch. D. 665).

Thus a gift in trust for testator's widow for life, and after her death for his children or their issue, by a substitutional gift, only those grandchildren would take who survived their parent. Whereas a gift to the widow for life, and after her death for such of the testator's children as should be then living and the issue of those then dead, being an original alternative gift to the issue, all grandchildren would take who survived the testator, even although they died before their parent the original legatee. See *Re Woolley, Wormald v. Woolley*, [1903] 2 Ch. 206.

#### PARAGRAPH (7).

Alternative gift to two classes exclusive of each other.

In a marriage settlement of stocks there was an ultimate trust for "all and every the child and children or grand-

child of A." living at the death of the survivor of the husband and wife :—*Held*, that the words "or grandchild" could not be construed as giving a tenancy in common to the children of A., with substitution of the issue of any deceased child for him or her (*Price v. Lockley* (1843), 6 Beav. 180), but was a gift to classes as *joint tenants* in the alternative, so that each class was exclusive of the other; and consequently that there being children of A. alive, no grandchild could take (*Re Coley, Gibson v. Gibson*, [1901] 1 Ch. 40, and see *Holland v. Wood* (1870), 11 Eq. 91). It would seem, however, that in a will it might have been different. In a settlement, where property is given in default of appointment to "the children or any the child *or* remoter issue of A. on the happening of certain contingencies, a child living at the happening of the contingencies will take to the exclusion of his issue (*Re Lund, Stanfield v. Keene* (1904), 89 L. T. 606).

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Para. (7).

#### ART. 60.—*Conditions imposed on Erroneous Assumptions.*

If a testator makes a condition based upon a mistake of fact, the condition will nevertheless be binding, unless it appears that the condition was only to take effect if and so far as the assumed state of facts remained unaltered at his death.

These cases generally arise in relation to directions to bring certain sums into account.

Directions to bring advances into hotchpot.

"Erroneous recital cases may be divided into two classes. In class one, the testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced, and direct the legatee to bring that sum, or the

**Art. 60.** sum 'hereinbefore recited to have been advanced,' into hotchpot; or he may, by other appropriate language, show an intention that the legatee shall absolutely and in any event bring the sum mentioned into hotchpot—in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, and only receiving the balance payable to him on that footing. In class two, the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs the debt, 'or so much thereof as shall remain unpaid' at the testator's death or the time of distribution, to be deducted and brought into account. In cases of this class the testator really intends that there shall be brought into account the debt, or balance thereof, which is actually owing at the time of death or distribution" (*per* SWINFEN EADY, J. : *Re Kelsey, Woolley v. Kelsey*, [1905] 2 Ch. 465; and see also, as to class one, *Re Wood, Ward v. Wood* (1886), 32 Ch. D. 517, and *Re Aird's Estate, Aird v. Quick* (1879), 12 Ch. D. 291; and as to class two, *Re Taylor, Tomkins v. Underhay* (1883), 22 Ch. D. 495).

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## CHAPTER V.

## THE INTERMEDIATE INCOME OF CONDITIONAL GIFTS.

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62.— <i>Income of a fund given to a contingent class after one has attained a vested interest</i>	- 329

ART. 61.—*Whether contingent Gift comprises intermediate Income.*

(1) A general *residuary* but contingent bequest of personal estate includes the intermediate income during the period allowed for accumulations.

(2) A contingent devise of real estate does not include the intermediate rents.

(3) A blended residuary contingent gift of both real and personal estate, *primi facie* includes the intermediate income of both.

(4) A contingent general legacy does not carry interest, nor does a contingent specific legacy carry intermediate income, unless :

(a) It is expressly or impliedly directed to be at once severed from the general estate; or

(b) The legatee is an infant with regard to whom the testator is parent, or *in loco parentis*, and has not provided any other fund for his maintenance; or

## Art. 61.

(c) The testator has directed the income to be applied for the legatee's maintenance (*semble*).

(5) If a contingent legacy or devise which carries intermediate income is settled on persons in succession, any accumulations not applied for maintenance form an accretion to capital.

## PARAGRAPHS (1), (2) AND (3).

Intermediate  
income of  
residuary  
estate.

“ Since the case of the *Countess of Bective v. Hodgson* (1864), 10 H. L. Cas. 656—I think long before—it has been settled law that a gift of residuary personal property on a future contingency, carries with it the intermediate income: the same rule applies to a mixed fund. But that rule is modified by the *Thellusson Act*. That modification was worked out most carefully by the House of Lords. All I can do now is to declare that the income should be accumulated for the benefit of those who may be ultimately entitled, for twenty-one years, or until the death of Mrs. Smart without a child” (*per* COZENS-HARDY, J.: *Re Taylor, Smart v. Taylor*, [1901] 2 Ch. 134; and see also *Re Lindo, Askin v. Ferguson* (1888), 59 L. T. 462; *Re Adams, Adams v. Adams*, [1893] 1 Ch. 329 (a)).

Rule stated  
by Lord  
ELDON.

In *Genery v. Fitzgerald* (1822), Jac. 468, Lord ELDON said: “ Where personal estate is given to A. at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits (*b*). But where he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both. Here the property was partly real, partly personal, and

(a) This case was dissented from in *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30, but on another point.

(b) See also *Earl of Bective v. Hodgson* (1864), 10 H. L. Cas. 656.

partly of such a description that the testator does not seem to have known whether it was real or personal. He does not, by his will, create any trust, but makes a legal devise and bequest of the whole together: then, is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is." See also *Re Burton, Banks v. Heaven*, [1892] 2 Ch. 38.

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PARAS. (1),  
(2) and (3).

In *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360, PEARSON, J., carried the rule further, and held that the intermediate rents, as well as the intermediate income of the personalty, passed to the legatee, although the gifts of real estate and personal estate were in different parts of the will, and although they were only substantially, and not strictly, settled upon the same trusts. His lordship considered that the test in all such cases is, "Has this testator, or has he not, mixed up the whole of his property in one mass?" . . . Has he "intended the whole of his residuary realty, and the whole of his residuary personalty, to go together to the same objects of his bounty, and in no other way?"

But a future devise of real estate by itself, whether it be residuary or specific (*Earl of Beville v. Hodgson* (1864), 10 H. L. Cas. 656; *Holmes v. Prescott* (1864), 12 W. R. 636), and whether it be legal or equitable (*Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523), does not carry the intermediate income.

The rule is, however, like most rules of construction, founded merely on an inference as to what a testator's intention is under the circumstances, and consequently, where the facts show that he did not intend the contingent legatee to take the intermediate income, the latter will not take even the intermediate income of residuary personal estate, although of course the result is a partial intestacy. For instance, where a prior life estate given to A. failed

Devise of  
real estate,  
and bequest  
of personal  
estate in  
different  
parts of the  
will.

Rule may be  
rebutted by  
other parts  
of the will.

**Art 61.** because A. witnessed the will, it was held that, as there  
 Paras. (1), was obviously no intention that the contingent remainder-  
 (2) and (3). man should take the income during the life of A., it could  
 not be accumulated for them, but passed as undisposed of  
 (*Re Townsend, Townsend v. Townsend* (1887), 34 Ch. D.  
 357, followed in *Aplin v. Stone*, [1904] 1 Ch. 543).

#### PARAGRAPH (4).

Intermediate income of contingent specific or pecuniary legacies. With regard to contingent specific and general pecuniary legacies, the ordinary rule is that the first do not carry intermediate income, nor the second bear interest. The income of specific legacies therefore fall into residue (*Re Inman, Inman v. Rolls*, [1893] 3 Ch. 518; *Re Dickson, Hill v. Grant* (1885), 29 Ch. D. 331). But this rule yields to intention to the contrary, either expressed or implied, and such intention is usually implied from the circumstances stated in paragraphs (a), (b) and (c).

Direction to sever from residue. Thus, where a testator directs a specific legacy to be severed from the residue of his estate, the inference is that it is once and for all taken away from residue, and appropriated to the contingent trusts declared in relation to it, and that the testator cannot have intended that the income should fall back into residue. For instance, where a fund has been severed for the benefit of a tenant for life and remainderman on the latter attaining twenty-one, the intermediate income between the death of the life tenant and the vesting of remainder goes along with the remainder, and does not fall back into residue (*Kidman v. Kidman* (1871), 40 L. J. Ch. 359).

Contingent specific bequest of leaseholds. Again, where a testator gave leaseholds to trustees upon trust for his daughter for life, and after her death for her children at twenty-one or marriage, it was held that the effect of the bequest being to sever the leaseholds from the general estate, the intermediate rents and profits after the daughter's death went along with the leaseholds

themselves (*Re Woodin*, *Woodin v. Glass*, [1895] 2 Ch. 309). In giving judgment, KAY, L.J., said: "There is no doubt that a contingent bequest of chattels real or of pure personalty, not being residuary personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate will not carry the intermediate income." See also *Holmes v. Prescott* (1864), 33 L. J. Ch. 264; *Guthrie v. Walrond* (1883), 22 Ch. D. 573; *Re Medlock* (1886), 55 L. J. Ch. 738; and *Re Clements*, *Clements v. Pearsall*, [1894] 1 Ch. 665.

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Para. (4).

Moreover the severance (in order to carry the income) must be made in obedience to directions in the will *for the benefit of the legatee*. A mere severance so as to release the residuary estate and enable it to be distributed, is not sufficient (*Re Iman*, *Iman v. Rolls*, [1893] 3 Ch. 518; *Re Judkin's Trusts* (1884), 25 Ch. D. 743; *Festing v. Allen* (1844), 5 Ha. 573).

Severance must be directed and not merely made for convenience of administration.

With regard to paragraph (b), *supra*, JAMES, L.J., summed up the law in *Re George* (1877), 5 Ch. D. 837, as follows: "The rule of law is well established, that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent, or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect where the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." In *Re Moody*, *Woodroffe v. Moody*, [1895] 1 Ch. 101, KEREWICH, J., held that a gift of residue, out of which maintenance could be given under s. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), is not such a provision of maintenance out of another fund as to take the case out of the rule.

Contingent legacy where testator *in loco parentis*.

With regard to paragraph (c), this exception (if it exists), seems to be based on the argument, that if an

Contingent gift with direction to

**Art. 61.** *implied* gift of maintenance out of a contingent specific

Para. (4).  
apply income  
for main-  
tenance.

or general legacy carries the income, or gives a right to interest, *a fortiori* an express direction to apply the income for maintenance must do so. Consequently it is not restricted to cases where the testator stands *in loco parentis* to the legatee (*Re Richards* (1869), 8 Eq. 119). However, in a more recent case (*Chidzey v. Withby* (1872), 41 L. J. Ch. 699), WICKENS, V.-C., while following *Re Richards*, expressed some doubt as to its correctness. Under these circumstances this exception is possibly still open to question (*cf.* *Pett v. Fellows* (1818), 1 Sw. 561, note).

#### PARAGRAPH (5).

Where  
contingent  
settled gift  
carries inter-  
mediate  
income,  
accumula-  
tions accrue  
to capital.

“ It is of course well settled, that if and for such period as no maintenance is expressly provided for the infant by the testator [its father], the [contingent] legacy will bear interest for the maintenance. But the fact that the legacy is to bear interest for such a purpose, though it may be, and often is shortly referred to by saying that the legacy bears interest, does not make the legacy the less a contingent one, or put the infant in the position of having an immediate vested life interest in the income of the legacy. . . . And should there be a surplus during the infancy not covered by any order of court, and not required for maintenance, that surplus does not, in my opinion, become the property of the child, but is regarded as an accretion to the *corpus* of the contingent legacy ” (*per* ROMER, L.J. : *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685, at p. 706 : *Hanson v. Graham* (1801), 6 Ves. 239).

## Art. 62.

ART. 62.—*Income of a Fund given to a contingent Class after one has attained a vested Interest.*

Where a testator gives property to a contingent class under such circumstances as carry the intermediate income, then a member of the class who attains a vested interest is only entitled to the income of such share as he would be entitled to if the other members of the class should attain vested interests. But where the gift does not carry intermediate income, then the members of the class who have attained vested interests take the whole income, to the exclusion of those whose interests are still contingent.

Curiously enough, this point was not settled until 1894. In *Re Jeffery, Bart v. Arnold*, [1891] 1 Ch. 671, NORTH, J., held, that where a testator gave a fund to such of a class as attained twenty-one, under circumstances which gave them intermediate income along with the capital, nevertheless, after one of the class attained twenty-one, those who were of age took the entire income to the exclusion of minors. In *Re Burton, Banks v. Heaven*, [1892] 2 Ch. 38, however, CHITTY, J., dissented from this view. In *Re Adams, Adams v. Adams*, [1893] 1 Ch. 329, NORTH, J. (after consideration), still adhered to his decision in *Re Jeffery, Bart v. Arnold*. In *Re Caldwell, W. N.* (1894), 13, KERWICH, J., followed *Re Jeffery, Bart v. Arnold*, but expressed a hope that the point would shortly be settled by the Court of Appeal, and in *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30, it was so settled in accordance with the rule as above stated; and subsequently in *Re Jeffery, Bart v. Arnold*, [1895] 2 Ch. 577, NORTH, J., reversed his prior decision.

In *Re Holford, Holford v. Holford, supra*, LINDLEY, L.J., said: "The class cannot now *wholly* fail, for one child has

Conflict of authority settled in 1894.

Statement of rule by LINDLEY, L.J.

**Art. 62.** — attained twenty-one, and if all the other members of the class die under twenty-one, the child who has attained twenty-one will take the whole fund absolutely. There is good sense in saying, that the income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist ; but there is no sense in saying that one of a class takes the whole income, in which other persons belonging to the same class have already a contingent interest which may become absolute.”

Where gift  
does not  
carry the  
intermediate  
income.

Where, however, the gift is such as not to carry intermediate income (*e.g.*, a gift of real estate), then those members of the class who have attained vested interests take the whole income, whether the gift be legal or equitable (*Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523).

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## PART VI.

### CHARGES OF DEBTS, LEGACIES AND ANNUITIES.

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#### ART. 63.—*Charge of Debts, Legacies and Annuities on Real Estate.*

(1) *Primâ facie* the primary fund for payment of a testator's debts (other than mortgage debts), and the exclusive fund for payment of legacies and annuities, is the general personal estate not specifically bequeathed. But, by various statutes, the real estate is liable for payment of debts in aid of the personal estate where there is a deficiency.

(2) A testator may either expressly or by implication charge his real estate with payment of debts, legacies and annuities, or any of them, either in aid of, or *pâri passu* with, or in exoneration of his personal estate. In interpreting such charges the following principles apply :

- (a) If there is a general gift of legacies, and then the testator gives all the rest and residue of his property, real and personal, as one mass, the legacies are impliedly charged on the real estate in aid of the personalty.

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- (b) In order that the personal estate may be *exonerated* from its *primary* liability, the intention must appear either expressly or by necessary implication not only to charge the real but to discharge the personal estate.
- (c) If the real estate be directed to be sold, and the proceeds of the sale and the personal estate are given together, either expressly subject to debts, or debts and legacies, or (*semble*) impliedly subject to legacies under paragraph (b) the real and personal estate are liable rateably.
- (d) Where the testator directs that the proceeds of the sale of real estate are to be considered as part of his residuary personal estate, the realty will be liable for debts, legacies and annuities rateably with the personalty.
- (e) If the real estate is charged either expressly or impliedly with legacies, the charge also extends to annuities, unless they are in the nature of rentcharges issuing exclusively out of real estate (a).

## PARAGRAPH (1).

Expression  
of contrary  
intention  
within Locke  
King's Acts.

This paragraph being a statement of law the reader is referred to works on the administration of assets for examples and details. But there is one point arising on it which is of importance in the interpretation of wills, viz., what expressions of a contrary intention are sufficient to negative the application of the statutes known as Locke King's Acts (17 & 18 Vict. c. 113 ; 30 & 31 Vict. c. 69 ; and 40 & 41 Vict. c. 34). By the combined effect of

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(a) *Heath v. Weston* (1853), 3 D. M. & G. 601.

these Acts, real or leasehold estate which is subject to a mortgage or to a vendor's lien is, as between the persons claiming under the testator's will, to be primarily liable for the debt or lien in the absence of *an intention to the contrary* appearing in the will or any other document.

**Art. 63.**

Para. (1).

With regard to what constitutes a "contrary intention" so as to negative the application of these Acts, a general direction to pay debts out of a particular fund or property, is not enough (30 & 31 Vict. c. 69). There must be "a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to them" (*per* GIFFORD, V.-C. : *Nelson v. Page* (1868), 7 Eq., at p. 28, and see *Re Newmarch*, *Newmarch v. Storr* (1878), 9 Ch. D. 12 ; *Re Rossiter*, *Rossiter v. Rossiter* (1880), 13 Ch. D. 355 ; *Elliott v. Dearsley* (1881), 16 Ch. D. 322 ; *Buckley v. Buckley* (1887), 19 L. R. Ir. 544 ; *Re Baron Kensington*, *Longford v. Baron Kensington*, [1902] 1 Ch. 203 ; *In re Valpy*, *Valpy v. Valpy*, [1906] 1 Ch. 531).

Direction to pay debts out of particular fund.

But an express charge of trade debts upon residue has been held to furnish a contrary intention, where an equitable mortgage by deposit of title deeds had been made to secure a trade overdraft (*Re Fleck*, *Colston v. Roberts* (1888), 37 Ch. D. 677, and see also, to like effect, *Re Nevill*, *Robinson v. Nevill* (1890), 59 L. J. Ch. 511). And a similar result was arrived at, where the direction was to pay debts *except a specified mortgage* (*Re Loveland*, *Loveland v. Loveland*, [1906] 1 Ch. 542).

Express charge of trade debts.

#### PARAGRAPH (2).

Although in the case of testators who have died since 1897 the question of whether the will created a charge of debts on the real estate is not so material as it used to be (having regard to the fact that all freeholds are by that Act vested in the personal representative as if they were chattels real), yet it may still sometimes be of importance in the administration of assets to ascertain whether the testator has charged the debts on real estate, and if so,

Still important to ascertain whether debts charged on real estate.

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Para. (2).

whether merely in aid of his personalty or *pari passu* with or in exoneration of it. The mere fact that he has charged it, would seem still to make a difference in the order of its application as equitable assets, and to the executor's right of retainer; and of course where the real estate is of copyhold tenure (which does not vest in the personal representative), the question may be of great importance in relation to the power of the executor or the trustees of the will to sell for payment of debts without resorting to the courts, under Lord St. Leonards' Act (22 & 23 Vict. c. 35).

What constitutes charge of debts on realty.

With regard to what constitutes a charge of debts on real estate, an express charge is not essential; a direction that debts shall be paid is sufficient. As Lord ELDON said in *Shallcross v. Finden* (1798), 3 Ves. 738: "I agree that if a testator does manifest in any part of his will that his debts shall be paid, they are to be paid before any disposition of what he has power to dispose of. 'After payment of his debts,' means that until his debts are paid, he gives nothing: that everything he has shall be subject to his debts. To give these words any effect, they must charge the real estate." See also, for expressions constituting a charge, *Harris v. Ingledeu* (1730), 3 P. W. 91, and *Withers v. Kennedy* (1833), 2 M. & K. 607.

Formerly (and possibly still), however, a direction that debts should be paid *by the executors* only charged real estate devised to them. But it was immaterial whether it was devised to them beneficially or as trustees (*Dorer v. Gregory* (1839), 10 Sim. 393; *Dormay v. Borradaile* (1847), 10 Beav. 263; *Hartland v. Murrell* (1859), 27 Beav. 204). It is submitted, therefore, that now that all freeholds are vested in the executors of any will coming into operation since the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), the mere fact that the testator directs *them* to pay his debts no longer restricts the charge to freehold lands devised to them. Anyhow, where they are directed to pay them out of *his estate* generally or he uses other

expressions showing that he only disposed of his estate beneficially after debts should be paid, the whole of the real estate would, no doubt, be held to be expressly charged. See *Dowling v. Hudson* (1853), 17 Beav. 248; *Harris v. Watkins* (1854), Kay, 438.

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Para. (2).

# PARAGRAPH (2) (a).

But although slight expressions will suffice to create a charge of debts, a mere direction to pay legacies or annuities is not of itself sufficient to charge them on the real estate. See *Parker v. Fearney* (1826), 2 Sim. & St. 592. The old case of *Alcock v. Sparhawk* (1691), 2 Vern. 228, which is *contra*, has never been followed and may be considered to be long since overruled. And although, as will be seen (*infra*), a charge of legacies and annuities may be implied, nothing less than distinct evidence of intention that the devisee of the real estate is only to take the *residue* of the estate remaining after payment of the legacies and annuities will suffice to charge them on it.

What constitutes charge of legacies and annuities on realty.

Apart from express direction, the most usual circumstance from which a charge of legacies and annuities on real estate is inferred, is that stated in paragraph (2) (a), *supra*, p. 331, which is known as the rule in *Greville v. Brown* (1860), 7 H. L. C. 689. In that case Lord CAMPBELL said, "For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift."

Rule in *Greville v. Brown*.

The rule only applies to residuary real estate, at all events unless debts as well as legacies are charged on real estate.

Rule in *Greville v. Brown* restricted to residuary real estate.

**Art. 63.** An *express* charge of legacies on real estate, does not *primâ facie* charge lands specifically devised (*Spong v. Spong* (1829), 3 Bli. (N.S.) 84; *Conrou v. Conrou* (1857), 7 H. L. C. 190), and *à fortiori* an implied charge depending on the word *residue* could not do so. On the other hand, the mere fact that some real estate is specifically devised, does not negative the rule, although in such a case the term *residue of real estate* might fitly be applied to real estate not specifically devised (*Francis v. Clemon* (1854), Kay, 435, and *per* Lord CRANWORTH, in *Greville v. Browne*, *supra*, at p. 700). Moreover, where debts and legacies are expressly charged on real estate it has been held that inasmuch as that constitutes a charge of debts on *all* the testator's real estate, the legacies are also charged not merely on residue but on specifically devised real estate (*Re Emmerton, Maskell v. Farrington* (1862), 1 N. R. 37). But whether this would be extended to an implied charge under the rule in *Greville v. Browne* seems questionable.

#### PARAGRAPH (2) (b).

Where debts and legacies charged on realty, the primary liability of personal estate not *primâ facie* negatived.

Both with regard to debts and legacies there is a strong presumption that a charge of them on real estate is not intended to take away the primary liability of the general personal estate. Lord ELDON stated this in *Bootle v. Blundell* (1815), 1 Mer. 220, 230, in terms which have never been questioned, as follows: "I take it to be certain, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then it comes to this—upon each particular case, as it arises, the question will be, does there appear from the whole testamentary disposition taken together, an intention on the part of the testator, so expressed as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt

the personal." See also *Tait v. Northwick* (1799), 4 Ves. 816; *Duke of Lancaster v. Mayer* (1785), 1 Bro. C. C. 454; and *Watson v. Brickwood* (1804), 9 Ves. 447; *Re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547. **Art. 63.**  
 Para. (2) (b).

Thus a direction to sell the real estate for payment of debts and legacies does not make it primarily liable, but only in aid of the personalty if the latter proves deficient (*Rhodes v. Rudge* (1826), 1 Sim. 79; *McLeland v. Shaw* (1805), 2 Sch. & Lef. 538).

Nor is the general personal estate exonerated merely because the testator gives the whole of his personal estate to A., and his real estate, subject to payment of debts, etc., to B. (*Re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547).

#### PARAGRAPH (2), (c) and (d).

But the primary liability of the general personal estate may be negatived not merely expressly but by implication. Thus, "when a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does in effect direct that the *real and personal estate which have been converted* into that fund shall answer the stated purposes and every of them *pro ratâ* according to their respective values" (*Roberts v. Walker* (1830), 1 R. & My. 752). "Where there is a mixed fund of real and personal estate, the mere fact of the real and personal estate being given together does not constitute them a mixed fund for the payment of debts, legacies, or annuities; but in order to effect that purpose there must be a direction for the sale of the real estate so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will" (*per* TURNER, L.J.; *Trench v. Chase* (1855), 6 D. M. & G. 467; *Boughton v. Boughton* (1847), 1 H. L. Cas. 406).

Implied liability of real and personal estate to be applied *pro rata* when bequeathed as a mixed fund.

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Para. (2).  
(c) and (d).

But where there is such a trust for sale of the real estate, it will be liable *patri passu* with the personalty, although, by reason of lapse, the realty devolves on the heir and the personalty on the next-of-kin (*Roberts v. Walker* (1830), 1 R. & My. 752).

Where real  
estate  
directed to  
be sold and  
proceeds to  
fall into  
residuary  
personalty.

Another common instance of an implication that proceeds of real estate are to be charged rateably with personal estate, arises where a testator directs his real estate to be sold and the proceeds to fall into his residuary personal estate. ~ A testator has directed a fund to be set apart out of the amalgamated assets to answer an annuity, and has directed the fund so set apart to be disposed of as the residuary personal estate had been disposed of. Now the residuary personal estate had been directed to be applied in payment of debts, legacies, and personal and testamentary expenses, and the authorities show that a direction for the disposition of the proceeds of real estate in the same way as the residuary personal estate, is as much a direction to apply the fund to purposes to which the residuary estate is liable, as if those purposes had been declared with respect to the proceeds themselves. *Kidney v. Coussmaker* (1797), 1 Ves. jun. 436 ; 2 *ibid.*, 267) is a case of great importance and authority on this point. In that case Lord LOUGHBOROUGH said, ‘It is not going a great way too far to say, that where real estate is devised to executors, and there is a declaration that they shall sell, and *the produce shall go as the residue of the personal estate, that it shall go subject to all that would affect the residue of the personal estate.*’ Therefore on the authorities, as well as on the words of this will, I think that the proceeds of the real estate are charged with the legacies ~ (*per* TURNER, L.J.: *Bright v. Larcher* (1858), 3 De G. & J. 148).

Art. 64.

ART. 64.—*Whether annuities charged on corpus or only on income.*

(1) *Prima facie*, as between the annuitant and the residuary legatees, an annuity, like any other legacy, is charged on *corpus*: of the residuary personal estate but as between tenant for life and remainderman of settled residue the tenant for life must keep down the annuity out of income. This presumption, that *corpus* is charged, will not be rebutted:

- (a) by a direction to pay out of income (for that may well refer to the primary source only);
- (b) nor by a direction to set apart a fund to answer the annuity, which is to fall into residue when the annuity ceases, (for that is merely to enable the rest of the residue to be divided);
- (c) nor by charging the annuity on real estate, unless, *from the context*, it appears that the annuity was in reality a rentcharge.

(2) But an annuity will be exclusively charged on income where there is a direction to set aside a fund sufficient to yield a specified annual sum, and to pay the income to one for life with a *gift over* of the fund on the death of the annuitant, or any other indication that the testator contemplates that it will cease to form part of residue, and remain undiminished for the parties taking under the gift over. It then becomes merely a case of tenant for life and remainderman.

(3) Even where an annuity is only charged on income, arrears will *prima facie* be a continuing

**Art. 64.** charge on the income (even after the annuitant's death) unless the surplus income of each year is given over as it accrues.

PARAGRAPH (1).

Annuities primarily charged on income of personal estate.

An annuity, being only a legacy payable periodically, is primarily payable out of the personal estate not specifically bequeathed. But there is this difference, viz., that an ordinary legacy is payable out of *corpus*, even where the residue is settled upon persons in succession; whereas in the case of an annuity where the residue is settled, the tenant for life must (as between himself and the *remainderman*) keep down the annuity out of income. But this is without prejudice to the right of the *annuitant* to have arrears made good out of *corpus* (*Re Grant, Walker v. Martineau* (1883), 31 W. R. 703).

But may be primarily charged on *corpus*.

Of course this primary liability of income of settled residue is liable to be negatived by express direction: as, for instance, where the testator directs his executors to buy an annuity in the name of the annuitant. But in that case the annuitant is entitled to the capital sum itself as a legacy in lieu of the annuity (*Re Mabbett, Pitman v. Holborrow*, [1891] 1 Ch. 707), even although she may be a married woman restrained from anticipation (*Re Ross, Ashton v. Ross*, [1900] 1 Ch. 162), and even although the testator purports to forbid it (*Hunt-Foulston v. Furber* (1876), 3 Ch. D. 285; *Re Mabbett, Pitman v. Holborrow, supra*). The only means of preventing this is by a direction to purchase an annuity in the *names of the trustees*, with a proviso that it is to fall into residue, or go over to another, in the event of any attempted assignment (*Power v. Hayne* (1869), 8 Eq. 262; *Hatton v. May* (1876), 3 Ch. D. 148).

General rule that annuity charged on *corpus* if income insufficient.

PARAGRAPH (1) (a).

The rule that as between the residuary legatees and the annuitant, the *corpus* of residue is liable to make good

arrears of the annuity, is not negatived by a mere direction to pay out of income, as that is quite consistent with income being the primary source. The point was considered in *Re Mason*, *Mason v. Robinson* (1878), 8 Ch. D. 411, where JESSEL, M.R., made the following observations: "The testator bequeaths his residuary personal estate to trustees upon trust for sale, and to invest the proceeds in some or one of the investments thereafter authorised and to stand possessed thereof upon trust out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed, as for the time being shall be payable: and subject thereto upon trust for his sons and daughters. The question is, What is the meaning of the trust in this will? It is a trust to keep down the annuities, in the first place, no doubt, out of income, but it is not the less a trust to keep down: it does not do more than indicate a mode of providing for the annuities previously given. Why, then, should it prevent payment of the annuities being made out of the capital if the income proves insufficient? I am of opinion that it ought not to do so. . . ."

Art. 64.

Para. (1) (a).

#### PARAGRAPH (1) (b).

In *Carmichael v. Gee* (1880), 5 App. Cas. 588, the testator directed his trustees to invest his residuary estate, and to set apart a sufficient portion of such investments to produce an annuity of £1,200, "which I bequeath to my wife for her life." And after making another bequest, he continued: "And as to the entire residue of my trust estate, and as to that part set apart in favour of my wife I bequeath the same to" three grandchildren: *Held*, that this was the bequest of an annuity, and of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. The income of the whole residue not being sufficient to produce £1,200 a year, the deficiency

Rule in  
*Carmichael v.  
Gee*.

**Art. 64.** was ordered to be made good out of *corpus*. Lord SELBORNE, after pointing out that the separation from the residue of the fund devoted to the annuity was formal only, and not substantial, being ultimately given *uno flatu* with the residue to the same persons and in the same manner, proceeded as follows: “I find, therefore, nothing here except a testator giving an annuity to his wife; desiring her to enter into the immediate enjoyment of it, contemplating that during the whole of her life it may be a charge upon his general estate; but at the same time providing that, if the estate is converted into money, there shall be a sufficient investment to secure this annuity, so as to release the rest of the estate and to enable that to be paid over immediately to the residuary legatees.”

“If you find it to be the gift of an annuity . . . those who take subject to that gift, and those who take another portion of the residue of the estate (that gift having been previously directed to be taken out of it), must submit to any loss or inconvenience which may be occasioned by the fact that the estate of the testator has fallen short of what he, and everybody else, had expected would be the condition of the residue. But that will not convert this gift [the annuity], which was a gift out and out, into a gift which was a life tenancy only in a portion of the residuary estate” (*per* Lord HATHERLEY: *Carmichael v. Gee* (1880), 5 App. Cas., at p. 597).

#### PARAGRAPH (1) (c).

Charge of annuity on real estate does not relieve residuary personalty.

“There is also a further question whether the annuities are payable out of *corpus* or only out of income. The authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will. The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and

there the personal estate is not only not exonerated, but remains primarily liable, just as in the case of a charge of debts. Another class is where the legacy or annuity is a *specific gift out of real estate*, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it. The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable " (*per* WOOD, V.-C. : *Paget v. Huish* (1863), 1 H. & M., at p. 667 ; followed in *Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82). But such cases as the above, which lay down that where there is a bequest payable out of personal estate, the mere addition of a charge on real estate does not exonerate the personality, have no application to a case where, from the construction of the instrument, the court is led to the conclusion that the testator intended to create a rent-charge. Thus, where a testator gave real estate to trustees upon certain trusts, and by a codicil gave an annuity to S. during her life, and charged the same on two specific real estates, *with powers of distress and entry* in case the annuity should fall into arrear, it was held that this, although called erroneously an annuity, was really a rentcharge, and therefore issued exclusively out of the real estate in question (*Patching v. Barnett* (1882), 51 L. J. Ch. 78). In giving judgment, JESSEL, M.R., said : " Here is a gift by codicil to a lady of an annuity or yearly sum, which the testator directs to be charged upon two certain farms, and he directs that if it is in arrear or unpaid, it shall be lawful for her to distrain 'to the end and intent that she may be fully paid and satisfied the said annuity.' That is how she is to be paid, and then if it is in arrear for a longer time, it is to be lawful for her 'to enter into and upon and to hold all and

**Art. 64.**

Para. (1) (c).

**Art. 64.**

Para. (1) (c).

singular the hereditaments hereby charged with the payment of the said annuity or yearly sum of £100 and every part thereof, and to receive and take the rents and profits thereof to her and their own use until she and they shall be therewith and thereby or otherwise fully paid and satisfied the said annuity and the arrears thereof due at the time of such entry, and which shall afterwards accrue and become due during her and their being in possession of the hereditaments, together with all costs charges and expenses,' and so on. It appears to me to be too plain for argument that that is a legal limitation of a rentcharge. The words 'annuity or yearly sum' no doubt may describe both a personal annuity and a rentcharge. When you look to the subsequent limitation and on what it is charged, there is a rentcharge." See also to same effect *Buckley v. Buckley* (1887), 19 L. R. Ir. 544, and *Re Waring*, [1896] 1 Ir. R. 427.

## PARAGRAPH (2).

Cases where  
*corpus* is not  
charged with  
annuity.

"There are two classes of cases between which I think a distinction should be made. The first is a class of cases of which *Baker v. Baker* (1859), 6 H. L. C. 616, is an instance, in which the testator has not given an annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. . . . What is given, and what the person to whom the income is to be paid takes, is the income of the capital sum which accrues due during his life, and nothing else" (*per* JESSEL, M.R., *Re Mason, Mason v. Robinson* (1878), 8 Ch. D., at p. 414).

"It appears to me clear that if you take into your view the two different classes of cases, the one *Baker v. Baker*, *supra*, and the other *Wright v. Callender* (1852), 2 De G. M. & G. 652,\* in the one class there is a general trust fund which is partitioned between two parties; the

one taking a life interest and the other taking an interest in remainder. That is the case of *Baker v. Baker*; and there of course the person entitled to the life interest in that fund only, has not any right to do more than receive the income accruing from that fund" (*per* Lord HATHERLEY : *Carmichael v. Gee* (1880), 5 App. Cas., at p. 597).

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Para. (2).

PARAGRAPH (3).

"There is another class of cases of which *Booth v. Coulton* (1870), 5 Ch. App. 684, is one, in which there is not a gift of an annuity simpliciter, but a fund is directed to be invested or there is an existing investment or an existing estate producing income, and the testator directs that out of the income a life annuity is to be paid and subject thereto the fund or estate *is to go elsewhere*. That class of cases has been held to mean this, that, there being no direction that the annuity is to be paid out of income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the arrears of the annuity are satisfied" (*per* JESSEL, M.R. : *Re Mason, Mason v. Robinson* (1878), 8 Ch. D., at p. 415; and see also *Forbes v. Richardson* (1853), 11 Ha. 354, and *Taylor v. Taylor* (1874), 17 Eq. 324).

Life annuity payable out of income of a particular fund.

But this is not so where the surplus income of each year is given over as it accrues. Thus in *Stelfox v. Sugden* (1859), Johns. 234, an annuity was given to the testator's widow during her life out of the interest, dividends and annual proceeds of the investment of his residuary estate, the residue of such interest, dividends and annual proceeds to be divided *annually* or oftener if his trustees should think proper among his brothers and sisters :—*Held*, not only not a charge on *corpus*, but also that the widow's representatives had no charge on the income accrued after her death for arrears. And WOOD, V.-C., said, "In order

Surplus income of each year given over as it accrues.

**Art. 64.**

Para. (3).

to support the construction for which the widow contends, it would be necessary to impute to the testator this absurd intention—that the trustees after complying with these directions during the lifetime of the widow, so far as the amount of the rents may enable them to do, are, after her death, to go on year by year retaining in their hands, out of the subsequent rents and profits, so much as shall be sufficient to make good to the widow's estate all arrears which may have accrued due in respect of her annuity; for they cannot otherwise recoup to themselves whatever they may have paid to the other devisees during the earlier years of the trust in respect of surplus rents and profits, which the testator has himself directed them to pay to other devisees from year to year during the lifetime of his wife. The whole of the will as it appears to me, proceeds upon the clear assumption that the trust property when converted and invested will produce an income sufficient, not only to satisfy the annuity bequeathed to the widow, but also to leave a surplus for the other devisees during her life; and although there follows a direction that, after her decease, the trustees are to divide 'the *residue* of the trust moneys' among the persons named in the gift over, yet I cannot so construe, of necessity, these words as to impute to the testator the intention I have described." See also *Wormald v. Muzeen* (1881), 45 L. T. 115; *Foster v. Smith* (1845), 1 Ph. 629; *Earle v. Bellingham* (1858), 24 Beav. 445.

## PART VII.

### EXECUTORY SETTLEMENTS.

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#### CHAPTER I.

##### EXECUTORY SETTLEMENTS, GENERALLY.

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66. <i>Construction of executory settlements in marriage articles and wills</i> - - - - -	348

##### ART. 65. — *Executory Settlements defined.*

An executory settlement is either—

- (a) An agreement or covenant for the subsequent execution of a settlement; or
- (b) A direction or declaration of trust (usually in a will giving instructions, or short heads of settlement, from which a trustee is subsequently to model a formal settlement of property.

In contemplation of marriage, A. and B. enter into a contract that, in consideration of the intended marriage, the lady's reversionary interest under her grandfather's will

Illustration of an executory settlement created

**Art. 65.** shall be settled “upon the usual marriage settlement trusts.” Such a contract would be an “executory settlement” to be carried out by a properly framed deed.  
by instrument *inter vivos*.

Illustration of an executory settlement created by will. So again, if a testator by will gives property to trustees, in trust to cause it to be settled on his daughters and their children, that is an executory settlement.

In both cases, after the property has been actually settled pursuant to the agreement or will, the settlement will then be called an executed settlement.

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ART. 66.—*Construction of Executory Settlements in Marriage Articles and Wills.*

(1) In the construction of executory settlements, the court is not confined to the language used. Where it is improper or informal, or would create an illegal trust, or would otherwise defeat the intention, the court will not follow the strict meaning of the words used, but will order a settlement to be made in a proper and legal manner so as to answer the intent of the parties.

(2) In the case of marriage articles there is the strongest presumption that the motive was to provide for the issue of the marriage; and consequently words, which read in their ordinary sense would defeat that object, will be bent in order to carry it out.

(3) But in the case of voluntary deeds and wills directing a settlement, there is no such inherent presumption; and consequently some intention must be manifested either verbally in the instrument itself,

or inferentially from its object or from other instruments to which it refers. Art. 66.

### PARAGRAPH (1).

“In matters executory, as in case of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, this court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner, so as may best answer the intent of the parties” (per Lord COWPER : *Stamford v. Hobart* (1710), 3 Bro. P. C. 33). General principle.

In one case, a testator bequeathed money to trustees upon trust to purchase real estate, and settle it upon A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of A.'s body, and with a power to jointure. He also devised land to A. upon exactly similar uses. It was held, that the testator manifested an intention to give A. a life estate only ; and that, consequently, in the case of the executory trusts, this intention should be carried out : but that in the case of the devise, that being executed, must be construed according to the rule in *Shelley's Case* (*Papillon v. Voice* (1728), 2 P. W. 471 ; *Trevor v. Trevor* (1847), 1 H. L. Cas. 239). In fact, any indication that the first taker is not to take in tail or fee is sufficient in an executory trust ; as, for instance, a direction that he is to be unimpeachable for waste, or that he shall not have power to bar the entail, or the like. See *Papillon v. Voice*, *supra* ; *Parker v. Bolton* (1836), 5 L. J. Ch. 98, and *Thompson v. Fisher* (1870), 10 Eq. 207. Executory and executed settlement in same instrument.

A devise (subject to a life interest of testator's widow) upon trust to convey, assign, and assure freehold property “unto and to the use of my son T. P., and the heirs of his body lawfully issuing, but in such manner and form,

**Art. 66.****Para. (1).**

nevertheless, and subject to such limitations and restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter R. F., her heirs, executors, administrators, and assigns": —*Held*, that the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first and other sons daughters as purchasers in tail, with remainder to R. F. in fee (*Thompson v. Fisher, supra*).

Where strict construction would make trust illegal.

A testator devised lands to a corporation, in trust to convey to A. for life, and afterwards, upon the death of A., to his first son for life, and then to the first son of that first son for life, with remainder (in default of issue male of A.) to B. for life, and to his sons and their sons in like manner. Lord COWPER said, that though the attempt to create a perpetuity was vain, yet, so far as was consistent with the rules of law, the devise ought to be complied with; and he directed that all the sons already born at the testator's death should take estates for life, with limitations to their unborn sons in tail (*Humbertson v. Humbertson* (1716), 1 P. Wms. 332; *Williams v. Teale* (1847), 6 Ha. 239; *Lyddon v. Ellison* (1855), 19 Beav. 565; and see *Re Russell, Dorell v. Dorell*, [1895] 2 Ch. 698).

Separate use imported in executory trust.

In *Willis v. Kymer* (1877), 7 Ch. D. 181, a testatrix had by her will (after requesting her sister Eliza to perform her wishes as therein expressed) bequeathed various legacies to her brothers and sisters and their children, including a legacy of £3,000 to her brother John for life, "the principal to be divided at his death between his children John, Sophia, and Mary Ann." The testatrix subsequently made a codicil, whereby she bequeathed to Eliza "all I possess," requesting that at her death she "will leave the sums as I have directed heretofore." Eliza by her will appointed the shares of Sophia and Mary Ann to them to their separate use, and the

question then arose whether she could do so; and Sir GEORGE JESSEL, M.R., said, "I am of opinion that Eliza had power to attach a limitation to separate use. . . . The original will and codicil say nothing about separate use. They merely direct her to leave the money after her brother's death to his children, and nothing more. She is, therefore, bound not to make a different disposition. Well, she has conformed to that direction by leaving the money to the children, and, in doing so, has taken care to dispose of it in such a manner that the shares of the daughters shall, in case of their marriage, still remain for their own benefit, thus effectually carrying out her sister's intention."

**Art. 66.**

Para. (1).

A testator directed his trustees to purchase lands in the counties of N. and D., to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every son of J. S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—*Held*, that the younger sons of J. S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross-remainders over (*Sartees v. Sartees* (1871), 12 Eq. 400).

Cross-remainder sometimes implied.

Where a marriage or other settlement of personalty contains a power to vary investments, and a covenant to settle after-acquired property on similar trusts, a settlement of after-acquired real estate should contain a power of sale, as that is analogous to a power of varying investments of personalty (*Elton v. Elton* (1860), 27 Beav. 634, and see *Tait v. Lathbury* (1865), 1 Eq. 174; *Re Rayner*, *Rayner v. Rayner*, [1904] 1 Ch. 176; *Re Gent and Lamp's Contract*, [1905] 1 Ch. 386).

**Art. 66.**

Para. (2).

## PARAGRAPH (2).

Marriage  
articles  
always  
construed in  
favour of  
issue.

The above examples show the liberal interpretation which the court gives to executory settlements generally. But although there is no difference of principle in this respect between executory trusts arising on marriage articles, and those arising on wills or voluntary deeds, yet in one respect they do differ. For marriage articles by their very nature, furnish more emphatically a clue to the persons intended to be provided for (viz., the spouses and issue of the marriage) than do wills or voluntary deeds. It is, therefore, a principle of construction, that an intention to benefit issue will be presumed in the case of marriage articles : whereas in the case of executory settlements directed by wills or voluntary deeds, that intention (if it exists) must be gathered, either from the words of the will or deed, or from the nature and object of the transaction.

Rule in  
*Shelley's Case*  
generally  
inapplicable  
to marriage  
articles.

Thus, in marriage articles, a covenant to settle estates to the use of the husband for life, with remainder to the wife for life, with remainder to their heirs male and the heirs of such heirs male (which in an executed settlement would give an estate in special tail male to the husband under the rule in *Shelley's Case*), is always construed to mean that the settlement shall be so drawn as to give life estates only to the husband and wife successively (*Trevor v. Trevor* (1847), 1 P. W. 622 ; *Streatfield v. Streatfield* (1779), 1 W. & T. L. C. 416 ; *Lambert v. Peyton* (1860), 8 H. L. Cas. 1). For it is not to be presumed that the parties meant to put it in the power of the husband to defeat the very object of the settlement, which is to make a provision for the issue of the marriage. Nevertheless, where the articles show that the parties understood the distinction (as, for instance, where part of the property is limited in strict settlement and part not), the trust will be construed strictly (*Howel v. Howel* (1751), 2 Ves. sen. 358 ;

*Powel v. Price* (1717), 2 P. W. 535; *Highway v. Banner* (1786), 1 Bro. C. C. 584; and see *supra*, pp. 215, 216). **Art. 66.**  
Para. (2).

But (somewhat curiously) it has been held that marriage articles providing that a certain estate should be "strictly settled" in the event of the lady having issue, did not authorise any provision for younger children; apparently on the ground that the main object of strict settlement of real estate is to keep it in the family (*Grier v. Grier* (1872), L. R. 5 H. L. 688). But *cf. Wright v. Wright*, [1904] 1 L. R. 360, where under a direction to settle strictly in a will, it was proper to provide a jointure for a widow.

Direction to settle strictly does not authorise portions for younger children.

On the other hand, it has been held, where marriage articles provided for "powers usually contained in settlements of a like nature," that powers of sale, exchange, etc., were authorised (*Duke of Bedford v. Marquis of Abercorn* (1836), 1 My. & C. 312; and see *Wise v. Piper* (1880), 13 Ch. D. 848). But these decisions would seem to be of little importance since the Settled Land Acts. A reference to certain specific powers has been held impliedly to negative any others, on the principle stated in Art. 6, p. 54, *supra* (*Brewster v. Angell* (1820), 1 Jac. & W. 625).

An intended husband covenanted to settle real estate to the use of himself for life, with remainder to the use of the intended "wife and children." It was held that, although in the case of an executed trust by will this would (under the rule in *Wild's Case*, p. 222, *supra*) have given the wife an estate tail, yet the true construction of marriage articles was that she should only take a life estate, with remainder to the children as tenants in common (*Rossiter v. Rossiter* (1863), 14 Ir. Ch. R. 247).

Rule in *Wild's Case* not followed in executory trust in marriage articles.

In *Cogan v. Duffield* (1876), 2 Ch. D. 14, there were marriage articles by which the lady's fortune was agreed to be transferred to trustees, "the trusts of the income thereof being for the benefit of the said Agnes Duffield and Joseph Cogan during their lives, and the trusts of the

Ordinary form of settlement of wife's personal estate under marriage articles.

**Art. 66.**

Para. (2).

capital being for and amongst the children according to the appointment of the said J. Cogan and A. Duffield or the survivor of them, and in default of appointment to the children equally; and in the event of there being no children, and of the said J. Cogan being the survivor, the trust property to be at his absolute disposal." In giving judgment in the Court of Appeal, BAGGALLAY, L.J., made the following remarks: "The mode of settling a wife's fortune which is approved by the court is to give her the first life interest for her *separate use*, then a life interest to the husband; then (subject to the powers given to the husband and wife of appointing the fund among the issue of the marriage) it is given equally to such of the children as being sons attain twenty-one, or being daughters attain that age or marry; or else to the children equally, with gifts over in favour of the others if any of them being sons die under twenty-one, or being daughters die under that age and unmarried. If there is no child who being a son attains twenty-one, or being a daughter attains twenty-one or marries, then, if the wife survives, the fund is limited to her; but if she dies in the husband's lifetime she has a general power of appointment over it; and in default of any exercise of that power, it is given to her next of kin as if she had died intestate and without having been married. Such being the form of settlement which the court considers most expedient, what would it do as to these articles? So far as they expressly provide for the destination of the income or capital, the court must yield to them. But in construing them, it will have regard to what is recognised as the most proper form of settlement. Now here, as regards the income, the articles are mere heads, and do not make a complete disposition of the income during the lives of the husband and wife. It is necessary to supplement them; and I agree that they ought to be carried into effect by giving the wife the first life estate to her *separate use*, and she is therefore entitled to the arrears of income. When we come to the provisions

for the children, we find only general words which must be supplemented. I cannot entertain any doubt as to what the court would have done if this had been a suit to have a settlement executed in pursuance of the articles, instead of a suit to rectify the settlement when made. The settlement would either have made the interests of the children contingent on their attaining twenty-one being sons, or being daughters attaining that age or marrying; or it would have contained limitations over of the shares of sons dying under twenty-one, and of daughters dying under that age and unmarried. The husband then could not take as representative of a child who died an infant and unmarried, and the articles contain no pretence for saying that there was any direct gift to him in the event of his wife surviving him.

Art. 66.

Para. (2).

Since *Cogan v. Duffield*, *supra*, was decided, it has been held that the wife's life estate ought to be *without power of anticipation* (*Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274); and that (*semble*) the power of appointment among issue should be given to the spouses and *the survivor of them* (*Re Gowan, Gowan v. Gowan* (1880), 17 Ch. D. 778), and that the settlement ought to contain the usual powers of advancement (maintenance being now implied by statute) and a power of appointment by will by the lady in default of issue, with the usual limitations to her next of kin in default of appointment in the event of her predeceasing the husband; and to herself absolutely in the event of her surviving him. See *Re Parrott, Walter v. Parrott*, *supra*, and *Nash v. Allen* (1889), 42 Ch. D. 54.

Additions to above provisions under recent cases.

It has recently been held, that where marriage articles provided for "such other agreements clauses and provisions as are usually inserted in settlements of a like nature," a covenant to settle after-acquired property of the wife could not be insisted on (*Re Maddy, Maddy v. Maddy*, [1901] 2 Ch. 820).

After-acquired property clause not implied in marriage articles.

**Art. 66.**

## PARAGRAPH (3).

Para. (3).  
Construction  
of executory  
trusts in  
wills where  
marriage is  
not referred  
to.

In the case of directions to settle a legacy contained in a will, it is obvious that the same presumption in favour of issue, or even of a husband, will not arise as in the case of marriage articles. Therefore, where a testator gave £300 to trustees, upon trust to lay it out in the purchase of lands, and to settle such lands to the only use of M. and her children, and if M. died without issue, "the land to be divided between her brothers and sisters then living," it was held that this gave M. an estate tail (*Sweetapple v. Bindon* (1692), 2 Ver. 536).

Direction to  
settle upon  
daughters  
strictly.

So where a testator directed that his daughters' shares should be "settled upon *themselves* strictly," it was held that the income of each daughter's share should, during the joint lives of herself and husband, be paid to her for her separate and inalienable use; and, if she died first, then her share should go as she should by will appoint, and in default of appointment, to her next of kin (exclusively of her husband); and if she survived, then to her absolutely (*Loch v. Bagley* (1867), 4 Eq. 122). A direction to *strictly* settle real estate does not imply that the tenants for life are to be punishable for waste (*Stanley v. Coulthurst* (1870), 10 Eq. 259).

Construction  
of executory  
trusts in wills  
where  
marriage of  
legatee is  
referred to.  
Cases of  
personal  
estate.

There is, however, no difference between the construction to be put on an executory trust created by marriage articles and on an executory trust created by will, *except so far as the former (by its very nature) furnishes more emphatically the means of ascertaining the intentions of those who created the trust* (*Sackville-West v. Lord Holmesdale* (1870), L. R. 4 H. L. 543). Consequently where the direction refers to a settlement *on marriage*, or in any other way shows an intention to benefit the issue of the legatee, effect will be given to it. Thus, in *Re Spicer, Spicer v. Spicer* (1901), 84 L. T. 195, the direction in the will was that no daughter of the testator should be entitled to receive her share, but only the income

thereof, with power to dispose of the principal by will if unmarried. But in the *event of any daughter marrying*, then the testator empowered his trustees to see that her share was “duly and properly settled upon her by deed, so that the same should be preserved for her separate use independently of her husband.” BUCKLEY, J., in the course of his judgment (after quoting the direction), said: “I have beyond that to give effect to the words ‘duly and properly settled.’ That means the subject of a proper settlement, and those words are in connection with this: ‘but in the event of any such daughter or female issue marrying.’ So that the parties cannot avail themselves of the doctrine in *Loch v. Bagley*, *supra*, where the words were merely ‘the girls’ shares to be settled on themselves strictly,’ and there were no words relating to marriage. It seems to me . . . that the shares on marriage ought to be settled on the footing of giving each daughter a life estate for her separate use, without power of anticipation, *with no life estate to the husband*; and there will be the usual trusts in favour of children, and the ultimate trusts usual in a settlement of the wife’s property.”

Art. 66.

Para. (3).

On similar grounds, where a testator devised real estate to trustees upon trust, *upon the happening of the marriage* of his grand-daughter, *to convey* the estate to the use of her for life, with remainder to the use of her husband for life, with remainder to the issue of her body, with remainders over, it was held, that though the grand-daughter would have taken an estate in tail had it been an executed trust, yet as the trust was executory, it was to be executed in a more careful and accurate manner; and that as the testator’s intention was to provide for the children of the marriage, that intention would be best carried out by a conveyance to the grand-daughter for life, with remainder to her husband for life, with remainder to her first and other sons in tail, with remainder to her daughters (*Lord Glenorchy v. Barrille* (1733), 2 W. & T. L. C. 763).

Cases of real estate directed to be settled on marriage.

**Art. 66.**

Para. (3).

Direction  
on a man's  
marriage to  
settle in strict  
settlement.

A testator devised real estate to his son, and directed that *in the event of his son marrying*, it should be put in strict settlement. The son died without having executed any settlement, leaving a widow and three daughters, a fourth having predeceased him, an infant and spinster. One of the three infants died after the son, also an infant and spinster :—*Held*, that the proper settlement was a jointure for the widow, and subject thereto the property should be held in trust for such one or more of the two infants as should attain twenty-one or marry in fee simple (*Wright v. Wright*, [1904] 1 L. R. 360).

Direction  
on a man's  
marriage to  
settle per-  
sonal estate  
on his wife  
and children.

Again, where a fund was bequeathed to a man until marriage, and then to be settled on his *wife and children*, and in default of issue to revert to the testatrix's estate, the court directed that the settlement should contain a limitation of the fund to the husband for life, with remainder to the wife for life, with remainder to the children as the husband and wife should jointly appoint, with remainder as the survivor should by deed or will appoint (but if the husband were survivor, he was to have power to appoint amongst his children by a future marriage), with an ultimate remainder to all the children of the husband attaining twenty-one, or in the case of daughters, marrying under that age : and in default of children the fund to fall into the testatrix's residuary estate (*Re Gowan, Gowan v. Gowan* (1880), 17 Ch. D. 778, where the form of order is given showing the limitations in full).

Departures  
from the  
ordinary  
form where  
intention  
apparent.

Where, however, there are indications that the settlor contemplates a different form of settlement to any of those above indicated, his wishes will have effect given to them. Thus, in *Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274, a testator had bequeathed as follows : " To my daughter A., wife of M. W., I bequeath £10,000, this amount to be settled upon her for her life, and to be invested for her in good securities, in the names of two or

more trustees. At her death, £8,000 of the above sum to be divided equally amongst her children, and the remaining £2,000 to be given to her husband, if living; if deceased, then the whole amount is to be equally divided amongst her children." It was held by the Court of Appeal that, on the construction of the will, the settlement must be so framed as to make the contingent gift of £2,000 to "her husband if living," apply only to M. W., and not to any future husband (see *supra*, p. 66 *et seq.*, and *Nash v. Allen* (1889), 42 Ch. D. 54, where on the construction of the will, the decision was *contra*), and also, so as to confine the trusts in favour of the daughter's children, to her children by him. It was further held, that the settlement ought to be framed so as to restrain the daughter from anticipating the income, and so as to make the fund divisible only among children who should, being sons, attain twenty-one, or, being daughters, attain that age or marry. It was further held, that the settlement ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or next of kin in default of appointment, but not any power of appointment among the children, as such power would be inconsistent with the direction for equal division.

Art. 66.

Para. 63.

The above examples for the most part relate to cases where the testator contemplates the marriage of the legatee or devisee. But the same liberal construction will be given to his directions, where, *for any other reason apparent on the face of the will*, a technical interpretation would disappoint his intentions. Thus, in the leading case of *Sackville-West v. Viscount Holmesdale* (1870), L. R. 4 H. L. 543, Lady A., by a codicil to her will, declared her intention to be to give certain real and personal property to trustees, in trust to settle it "in a course of entail to correspond" (as near as might be)

Cases where, although marriage not referred to there are other indications of intention to benefit issue of devisee or legatee.

**Art. 66.**

Para. (3).

with the limitations of the Barony of Buckhurst, in such manner as the trustees should consider proper, or as their counsel should advise. The barony was limited to Lady De la Warr for life, with remainder to R. her second son and the heirs male of his body, with remainder to the third, fourth, and other sons in like manner. It was held that the property ought not to be settled upon R. in tail like the barony, but ought to be limited in a course of strict settlement to R. and other younger sons of Lady De la Warr for their respective lives, with remainder to their sons successively in tail male, in the order mentioned in the patent whereby the barony was created. And Lord CHELMSFORD said: “The best illustration of the object and purpose of an instrument furnishing an intention in the case of executory trusts, is to be found in the instance of marriage articles, where, the object of the settlement being to make a provision for the issue of the marriage, no words, however strong (which in the case of an executed trust would place the issue in the power of the father), will be allowed to prevail against the implied intention. So, as Sir W. GRANT said, in *Blackburn v. Stables* (1814), 2 V. & B. 367, ‘in the case of a will, if it can be clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict technical sense, the court, in decreeing such settlement as he has directed, will depart from his words to execute his intention.’ . . . There are cases of executory trusts in wills, where the words ‘heirs of the body’ have been made to bend to indications of intention that the estate should be strictly settled; and a direction in a will, that a settlement ‘shall be made as counsel shall advise,’ has been held sufficient to show that the words were not intended to have their strict legal effect (*Bastard v. Proby* (1788), 2 Cox 6). . . . It appears to me that the words of the codicil express an intention that the barony and the estates should go together to the same person, but not

that the limitations of the two should be identical. . . .  
The word 'correspond' does not mean that the limitations are to be exactly the same, but that they are to be adapted to each other so as to carry out the testatrix's intention that the estate and title should go together. . . .  
If the settlement were framed with a limitation in the words of the letters patent, Lord Buckhurst would be able to defeat the intention, and, by converting his estate tail into a fee simple, to separate the estate and the title for ever."

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**Art. 66.**

Para. (3).

## CHAPTER II.

COVENANTS TO SETTLE OTHER OR AFTER-  
ACQUIRED PROPERTY.

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ART. 67.—*How far the Wife is bound by such Covenants.*

(1) Whether a wife is bound by a covenant contained in a marriage settlement, to which she is a party, to settle her other or her after-acquired property, or whether such a covenant only binds the husband to settle whatever he may acquire *jure mariti*, depends on the words used, in accordance with the following principles :

- (a) If the words consist of an agreement or declaration, or even a covenant by the husband alone, that the wife's property "shall be settled," both spouses are bound.
- (b) A mere covenant by the husband alone that *he* [or, *semble*, that he and *all other necessary*

*parties (a)* will settle, does not bind the wife, unless the property referred to is specific. But a covenant by him alone that he, *and his wife*, will settle, binds her even although the property be not specific. Art. 67.

(2) Even where the wife is not bound, s. 19 of the Married Women's Property Act, 1882, preserves the effect of a covenant entered into by the husband only, to settle after-acquired property of the wife; and accordingly prevents such after-acquired property vesting in the lady as her separate estate under ss. 2, 5, whether the marriage took place before or since December 31st, 1882.

(3) If the covenant would be binding on the wife but for her infancy, it will be voidable only and not void; and if she wishes to repudiate it, she must do so promptly.

#### PARAGRAPH (1).

A marriage settlement contained the following clauses: Proviso or declaration that property shall be settled  
 "It is hereby provided declared and agreed by and between the said parties to these presents and the said [*husband*] for himself," etc., "doth hereby covenant promise and grant to and with the [*trustees*]" that in case the marriage should take effect, and the wife or the husband in her right should at any time during the life of the husband become possessed of or interested in or entitled to any personal estate, etc., in possession, reversion, remainder, or expectancy, the husband and wife should and would transfer and assign the same to the

(a) So held by BIRSE, J., in an unreported case of *Re Smith, Robson v. Tobog*, March 15th, 1900.

**Art. 67.** trustees:—*Held*, that the wife was bound (*Townshend v. Harrowby* (1858), 27 L. J. Ch. 553).

PARA. (1).

Covenant by the husband alone that the wife shall settle, binds the wife.

The last illustration is a simple case, and is, indeed, what arises under all instruments which are well drafted. But the point is not so simple where there is not a proviso and declaration (which, of course, *prima facie* binds all parties to the deed), but a covenant by the husband alone. In such cases it appears from the modern authorities, that the wife is bound where the covenant is that the property “shall be settled,” or that “he and the wife” will settle, on the ground that the wife is an assenting party to the covenant, and cannot afterwards obstruct its performance. Thus, in the case of *Butcher v. Butcher* (1851), 14 Beav. 222, the form of the husband’s covenant was, that in case any personal estate should at any time thereafter, during the coverture, come to or vest in the wife, or the husband in her right, the same should be paid, assigned, or transferred *by all proper parties*:—*Held*, that a reversionary interest in certain property, to which the wife became entitled during the coverture for her separate use, was bound by the covenant.

A similar decision was given by KAYE, J., in *Re De Ros’ Trust*, *Hardwicke v. Wilmot* (1885), 31 Ch. D. 81, where there was a covenant by the husband only, in general terms, but the acts which were to be done in pursuance of the covenant were expressly to be done *by the wife as well as the husband*.

Covenant by the husband alone that he will settle, is not binding on the wife.

On the other hand, in *Dawes v. Tredwell* (1881), 18 Ch. D. 354, where the words were very similar, except that the settlement was not to be “by all proper parties,” but the acts were *only to be done by the husband*, it was held that the property which came to the wife for her separate use, was not bound by the covenant.

After where the property is specific

In *Lee v. Lee* (1876), 4 Ch. D. 175, however, the late Sir G. JESSEL, M.R., decided that the wife is bound even

when the husband's covenant does not expressly state that she is to do any act or that the property is to be settled, *in cases where the property aimed at by the covenant is specific* and not general. In that case, an antenuptial settlement was signed by all parties, including the intended wife, and, by it, her parents agreed that they would appoint to her a share of certain reversionary property over which they had a power of appointment. The husband then agreed that *he* would settle such share as the wife might take *in the property in question*, either by appointment, or in default of appointment. It was held by the MASTER OF THE ROLLS, that although there was no express covenant by the wife, nevertheless the property was bound. He said: "Then the husband proceeds to settle, or agrees to settle, what does not belong to him, as, indeed, appears by the instrument itself. Unquestionably the property was not his to settle; it was his wife's, and he could not settle it himself, because during the lives of the wife's father and mother he could have no interest whatever, therefore, his covenant or agreement to settle was a covenant or agreement to settle not his own estate, but somebody else's. But his wife was an assenting party to this agreement. It was, therefore, simply an agreement by A., with B.'s assent to settle B.'s estate, and in such a case it is clear that B. is bound. So that, even if it is treated as a covenant by the husband alone, yet it is for valuable consideration, and with the assent of the wife, and she is therefore bound."

## Art. 67

Para. (1).

and the wife joins in the deed.

In the more recent case of *Re Haden, Coling v. Haden*, [1898] 2 Ch. 220, a marriage settlement contained a covenant by the husband alone, that all the real and personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife or the husband in her right *should forthwith be settled* upon the trusts of the settlement. The wife was a party to and executed the deed. During the coverture she became entitled, under the will of her father, to certain real estate.

Covenant by the husband alone that the property shall be settled.

**Art. 67.** It was held by STIRLING, J., that the property in question was bound. After commenting on the cases above cited, he said: "In the present case the covenant is by the husband alone, that the property shall be settled, not saying by whom. The wife was a party to and executed the settlement. It contains no recitals: so I gain no assistance from that source. It seems to me, I confess with some hesitation, that the only way in which I can deal with such a covenant is to look and see if it has a plain meaning, and, if so, to give effect to it. Looking at it from that point of view, and reading the material words, it is a covenant that all the real and personal estate which shall at any time be acquired by the wife or the husband in her right, shall be settled. Can I fairly limit the subject matter of the covenant to the interest of the husband in the real estate? It seems to me that I cannot. The words are, in my opinion, intended to include more than the mere interest of the husband. It is an agreement that all the real property of the wife shall be settled, and a person assenting to such a covenant must be taken to mean that the covenant shall take effect accordingly."

#### PARAGRAPH (2).

Effect of  
Married  
Women's  
Property Act  
on covenants  
binding the  
husband only,  
to settle  
property of  
the wife.

On the assumption that a covenant to settle after-acquired property is not binding on the wife, it follows that property which has been given to her for her separate use in equity, does not fall within the husband's covenant. It might be thought that the same result would follow where the wife becomes entitled to separate property not under any gift expressly conferring it upon her for her separate use, but under the general provisions of the Married Women's Property Act, 1882. This is not so, however, owing to the effect of s. 19 of that Act, by which it is enacted that "Nothing in this Act contained shall interfere with *or affect* any settlement or agreement for a settlement made or to be made, whether before or after marriage,

respecting the property of any married woman." But for the Act, the rights which a husband formerly took in his wife's property would have been bound by his covenant ; and it was held in *Hancock v. Hancock* (1888), 38 Ch. D. 78, that the effect of the section above quoted was to preserve to persons claiming under marriage settlements precisely the same rights under such covenants as they would have had if the Act had never been passed. In short, the effect of s. 19 seems to be to take away the character of separate property from all property which would, but for the Act, have been bound by a husband's covenant to settle it.

**Art. 67.**

Para. (2).

In the case now under consideration, NORTH, J., after deciding that the wife was not bound by the covenant, said : "If the fund in question is bound at all, it is bound by the covenant of the husband. How does the Act affect that? Sections 5 and 19, taken together, prevent the wife from saying that the separate use which is given to her by s. 5 standing alone, excludes the operation of the covenant in the settlement. The fund having, as it is admitted, arisen solely from personal estate of the testatrix, is bound by the covenant, and must be transferred to the trustees of the settlement. One point strongly urged on behalf of the petitioner was this—that the will of the testatrix was made after the Act came into operation, and that it does not contain any direction that the interests given by it to females shall be for their separate use, because the testatrix knew and relied upon the law as established by s. 5. But the answer to this argument is obvious. The fund does not belong to the wife for her separate use unless the Act makes it her separate property. If s. 5 stood alone, that would be the effect of the Act ; but by the combined operation of ss. 5 and 19, it is not so. The testator's knowledge must be taken to extend to the whole Act, and not to have been limited to one section only."

**Art. 67.**

Para. (2).

This decision of NORTH, J., was subsequently affirmed by the Court of Appeal. COTTON, L.J., saying: "Undoubtedly there was a settlement here, and it was respecting the property of this lady, and if we look at the natural meaning of the words of the section, we cannot help saying that it excepts from the Act everything which would interfere with the settlement, and would prevent the covenants contained in it from having operation. The 5th section does interfere with the settlement." See also *Re Whitaker, Christian v. Whitaker* (1887), 34 Ch. D. 227.

Such covenants exclude the operation of the Married Women's Property Act, even although entered into since 1882.

The above cited case (*Hancock v. Hancock*) was subsequently extended by CHITTY, J., in *Sterens v. Trevor-Garrick*, [1893] 2 Ch. 307. There an infant, being entitled to a sum of £1,000, joined with her husband in April, 1890, in executing a marriage settlement by which he and she purported to assign it to trustees upon the usual trusts. In October, 1891, she attained twenty-one, and forthwith disaffirmed the settlement, and claimed the £1,000 absolutely. It was argued that, as the marriage took place, and the settlement was executed after the Act (and not, as in *Hancock v. Hancock*, before it came into operation), s. 19 did not apply. CHITTY, J., however, held that the reasoning in *Hancock v. Hancock* was equally applicable, whether the marriage took place before or after the Married Women's Property Act, 1882, and consequently that the £1,000 was bound. See also *Buckland v. Buckland*, [1900] 2 Ch. 534.

## PARAGRAPH (3).

The statement in paragraph (3) is not a rule of interpretation, but of law, and it is only mentioned for the sake of convenience. Assuming that a woman, who is an infant, purports to covenant to settle her after-acquired property, and subsequently becomes entitled to property for her separate use (but not under the Married Women's Property Act, 1882), is she bound? The answer is, yes, unless she

has, after attaining her majority, and becoming aware of her right to repudiate, promptly disaffirmed her liability. See *Widitz v. O'Hagan*, [1900] 2 Ch. 87; *Wilder v. Pigott* (1882), 22 Ch. D. 263; *Greenhill v. North British, etc. Co.*, [1893] 3 Ch. 474; and *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421.

Art. 67.

Para. 33.

ART. 68.—*Property which is *primi facie* excluded from a covenant to settle other or after-acquired Property.*

*Primi facie*, covenants to settle other or after-acquired property (not definitely described) do not comprise :

- (1) Income, or (*semble*) capitalizations of income.
- (2) *Corpus* which a married woman is restrained from anticipating, unless she is simply restrained until it falls into possession.
- (3) Property over which the covenantor has *merely* a general power of appointment, with a gift over in default of appointment, or which she has a statutory power of making her own, unless she exercises such powers in her own favour.
- (4) Gifts made to her by her husband.

PARAGRAPH (1).

A settlement was made by a husband of all his personal estate to which he was then or might thereafter become entitled, in trust for himself for life with remainders over :—*Held*, not to comprise his interest in a fund bequeathed to him for life (*St. Aubyn v. Hamphrey* (1856), 22 Beav.

Primary  
residual  
estate  
only, and  
not income.

**Art. 68.** 175. and see also *Townshend v. Harrowby* (1858), 27 L. J. Ch. 553, and *Lewis v. Muddocks* (1810), 17 Ves. 48). The same principle applies to an annuity bequeathed to a wife (*Re Dowding, Gregory v. Dowding*, [1904] 1 Ch. 441). But of course life interest may be caught by such covenants where it is plainly intended that they shall be (*Scholfield v. Spooner* (1884), 26 Ch. D. 94; explained in *Re Dowding, Gregory v. Dowding, supra*).

Questionable whether such covenants bind property purchased out of the savings of income.

Whether, however, a wife who has covenanted to settle after-acquired property, is liable to settle property which she has purchased out of the savings of income, is not settled. In *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109, KEKEWICH, J., held that she was. On the other hand, ROMER, J., dissented from that view in the subsequent case of *Finlay v. Darling*, [1897] 1 Ch. 719, saying: "If income which the lady receives from the settled funds and property, is not bound by the covenant (and it is clear the income is not), it appears to me, on principle, not right to hold that, merely because the lady does not choose at once to spend that income, but accumulates it either in her purse or at her bankers, she renders that liable to be bound by the covenant which was not bound before. If one half-yearly income she received was not bound, I fail to see why, after several years' receipts of half-yearly income, when the money she had not spent of that income remained in her hands and exceeded £200, I should hold that that accumulated income passed from her and went to the trustees of the settlement. In my opinion that is not the meaning or intent of the covenant here; and, on principle, I think that the covenant ought not to be extended to that. If the accumulations in her hands or at her bankers are not held to be bound by the covenant, I fail to see on principle why I should hold the money bound when it becomes invested by her in some investment, such as consols or the like." This was followed by BUCKLEY, J., in *Re Clutterbuck, Blosam v. Clutterbuck* (1904), 73 L. J. Ch. 698; and it is humbly

conceived that the reasoning is correct, and that a woman who covenants to settle after-acquired property contemplates merely the settlement of property which may come to her by gift or bequest, and not property which she may acquire out of the savings of her income.

Art. 68.

Para. (1).

This view is strengthened by the case of *Churchill v. Denny* (1875), 20 Eq. 534. There, a naval officer had covenanted to settle any property which he might thereafter acquire. Some years afterwards, he commuted his half-pay for a capital sum which was then claimed by the trustees. It was, however, held that it was not liable.

#### PARAGRAPH (2).

Property coming to a lady with restraint on anticipation or alienation, is not bound by a covenant to settle unless she is merely restrained while her interest remains reversionary (*Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333; *Re Clarke's Trusts* (1882), 21 Ch. D. 748; *Re Parlin, Hill v. Schwarz*, [1892] 3 Ch. 510). Such covenants only refer to property which a wife *can* assign, and a restraint on anticipation effectually prevents her doing so during coverture (*Re Carrey, Gibson v. Way* (1886), 32 Ch. D. 361; *Re Blundell*, [1901] 2 Ch. 221). It is conceived, that although the restraint can now be removed by a judge, under s. 62 of the Conveyancing and Law of Property Act, 1881, a lady is under no obligation to seek that removal at the request of the trustees (see illustration to paragraph (3), *infra*), nor will the court remove the restraint in such a case unless it is clearly for her benefit (*Re Blundell, supra*).

Property given to wife without power of alienation is not subject to the covenant.

#### PARAGRAPH (3).

In *Townshend v. Harrowby* (1858), 27 L. J. Ch. 553, the wife had joined in a covenant to settle after-acquired property. She subsequently became the donee of a general property

Covenants to settle after-acquired property

**Art. 68.**

Para. (3).

do not oblige  
a donee of  
a general  
power of  
appointment  
to appoint  
the property  
to herself.

power of appointment over some property; but it was held that the covenant did not apply to it so as to oblige her to exercise the power in favour of herself or the trustees of the settlement. *KINDERSLEY, V.-C.*, said: "It was very important to uphold the broad distinction between property and power, and he (the Vice-Chancellor) had always endeavoured to do so. It was true that power might result in property, and the exercise of it, if general, might affect property in an indirect manner; but so long as it was unexercised it was distinct from property. In one sense it was interest in property, because if there was a power it could not be said that there was not some interest. Technically, however, in the eye of a court of law or equity, a power was not an interest, and an interest was not a power. This covenant was clearly not intended to apply to a mere power." See also *Ewart v. Ewart* (1853), 11 Ha. 276, and *Bower v. Smith* (1871), 19 W. R. 399.

But where property was given for such purposes as A. should appoint, and *in default of appointment to her absolutely*, it was held that she could not defeat a covenant to settle after acquired property exceeding £200, coming to her at any one time, and having one source, by appointing it to herself by a succession of appointments of £199 each. The decision is based on the gift in default of appointment being to *the lady herself*, so that any appointment would have been a taking away of property which she had already bound herself to settle (*Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574, following *Steward v. Poppleton* (1877), W.N. 29, and distinguished *Townshend v. Harrowby*, *supra*, and see also *Bower v. Smith* (1871), 19 W. R. 399, as explained in *Steward v. Poppleton* and *Re Lord Gerard, Oliphant v. Gerard* (1888), 58 L. T. 800, observed on *In re O'Connell, Mawle v. Jagoe*, *supra*).

Not bound to  
disentail  
property.

So, in *Hilbers v. Parkinson* (1883), 25 Ch. D. 200, it was held that the covenant did not oblige a wife, upon whom an estate tail had devolved, to exercise her statutory power of disentailing the property and conveying it to the

trustees in fee simple. (Approved and followed by the Court of Appeal in *Re Dunsany's Settlement*, *Nott v. Dunsany*, [1906] 1 Ch. 578). Art. 68.  
Para. (3).

#### PARAGRAPH (4).

In *Coles v. Coles*, [1901] 1 Ch. 711, there was an *assignment* of all the wife's property, present and future:—*Held*, by JOYCE, J., that assuming that it was effective as to after acquired property, it did not extend to presents made by the husband to the wife. The learned judge said, "I decide this case upon the grounds stated by MALINS, V.-C., in his judgment in *Dickinson v. Dillwyn*, (1869), 8 Eq. 551, where he says, 'on the broad grounds of intention, I am of opinion that the words of that covenant never could have been intended to apply to property which the wife should acquire from her husband.' What I mean is this; that in my own mind, rightly or wrongly, I have no doubt that if I were to make this assignment extend to this sum of money, I should be doing what the parties never intended or for a moment thought of. I therefore hold that this sum of money is not bound by the settlement." This case was followed in *Kingan v. Matier*, [1905] 1 Ir. R. 272.

Again, an indemnity given by a Scottish husband to his wife against an act (*e.g.*, change of domicile) which would deprive her of her *jus relicta* under the law of Scotland, does not bring the *jus relicta* within a covenant to settle after acquired property (*Re Simpson*, *Simpson v. Simpson*, [1904] 1 Ch. 1).

ART. 69.—*What is comprised in a General Covenant to settle Property to which the wife is presently entitled.*

Where the covenant is to settle property to which the wife "is now entitled," or words to that effect, all

**Art. 69.** property to which she then has any title, whether it be in possession, reversion, or contingency, is bound.

Covenants to settle present property comprise property to which the wife has a title, whether in possession, reversion, or contingency.

In *Re Jackson's Will* (1879), 13 Ch. D. 189, the covenant was "that if at the time of the solemnization of the intended marriage the wife shall be; or if at any time thereafter, and during the joint lives of the husband and wife she or her husband in her right shall become beneficially entitled to any real or personal property estate or effects for any estate or interest whatsoever, then and in every such case" it should be settled:—*Held*, that a reversionary interest in personalty which was vested in the wife at the date of the marriage, but was liable to be divested by the exercise of a power of appointment, was included in the covenant, although it did not fall into possession until after the husband's death. See also *Re Mackenzie's Settlement* (1867), 2 Ch. App. 345; *Agar v. George* (1876), 2 Ch. D. 706; *Cornmell v. Keith* (1876), 3 Ch. D. 767; and *Sweetapple v. Horlock* (1879), 11 Ch. D. 745.

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**ART. 70.**—*What is comprised in a Covenant to settle after-acquired Property of the Wife, or of the Husband in her right.*

(1) A covenant to settle after-acquired property of the wife is limited, *prima facie*, to property acquired during effective coverture.

(2) A covenant to settle property to which "the wife or the husband in her right shall become entitled," *prima facie* binds, not only future property of the wife, but also property to which she is entitled at the date of the marriage (*sed quære*, when the marriage took place since 1882).

(3) A covenant to settle property to which *the wife* shall become entitled binds— Art. 70.

- (a) property to which she is then entitled in reversion, remainder, or contingency; provided that it falls into possession during the period covered by the covenant; and
- (b) property to which she has no title at the date of the marriage, but in which she acquires a reversionary or contingent interest during the period covered by the covenant, even although it may not fall into possession during that period.

#### PARAGRAPH (1).

“The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it therefore, *prima facie*, is to be supposed not to be intended to apply to property the wife’s title to which does not accrue until after the husband’s death. We have consulted the Lord Chancellor [SELBORNE] on the case, and he agrees with us in the opinion that, in the absence of any expression showing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words ‘during the said intended coverture’ had been inserted. It appears to his lordship, as well as to us, that the rule laid down in *Dickinson v. Dillwyn* (1869), 8 Eq. 546, and *Carter v. Carter* (1869), *ibid.*, 551, is to be followed, and not the rule which was acted upon in *Stevens v. Van Voerst* (1853), 17 Beav. 305” (*per* JAMES, L.J., *Re Edwards* (1873), 9 Ch. App., at p. 100, and see also *Re Campbell’s Policies* (1877), 6 Ch. D. 686; *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76). This rule has lately been carried to its logical conclusion,

*Prima facie* a covenant to settle after-acquired property is to be limited to property acquired during effective coverture.

**Art 70.**

Para. (1).

the court holding that it applied where the coverture has been determined either by divorce or judicial separation (*Davenport v. Marshall*, [1902] 1 Ch. 82; *Re Simpson, Simpson v. Simpson* (1904), 1 Ch. 1).

On similar grounds it has been recently held that the *jus relicta* of a Scottish wife is not bound by such a covenant, even where coupled with a covenant by the husband in damages if she should be disappointed of it (*Re Simpson, Simpson v. Simpson, supra*).

But where the husband survives, it binds him to settle property acquired *jure mariti* after the wife's death.

The rule, as stated in *Re Edwards, supra*, was apparently expressed somewhat too broadly by the late Lord Justice JAMES; for a general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the husband survives, though it will be so restricted when the wife survives. In *Fisher v. Shirley* (1889), 43 Ch. D. 290, the wife was entitled to a vested reversionary interest in personal estate, which fell into possession after her death, and was claimed by her husband *jure mariti*. STIRLING, J., however, held that it was bound by the husband's covenant to settle the wife's after-acquired property. The learned judge, commenting upon Lord Justice JAMES' judgment in *Re Edwards, supra*, said: "No doubt the concluding words of the lord justice in that judgment at first sight support the contention on behalf of the husband. But when the literal construction of a covenant is departed from, one ought to look at the reason for so doing, and the reason assigned is, that the object of the covenant is to protect the property, the subject of the covenant, from the husband's marital right, and preserve it for the benefit of the wife and children. There is no need to protect property against the husband's marital right where the wife does not become entitled until after the husband's death: but there is need of such protection where the husband is the survivor and the property falls in after the wife's death. If effect were given to the husband's claim, his marital right would be

enforced instead of the wife's property being protected against it, and the very object of the covenant would be defeated. The words of the covenant in the present case are quite general, and the reason assigned for limiting them does not appear to apply, and in my opinion, they cannot, in the present case, be limited as suggested." It is difficult to reconcile this case with *Pearce v. Graham* (1863), 32 L. J. Ch. 359, where the wife's father gave her a legacy, which (as she died in the father's lifetime) became payable to the husband as her administrator by virtue of the Wills Act, and was held not to be bound by the covenant. This case does not seem to have been cited in *Fisher v. Shirley*, *supra*.

**Art. 70.**

Para. (1).

Whether the distinction made by STIRLING, J., would apply where the property is separate estate of the wife, otherwise than under the Married Women's Property Act, is not clear. On the one hand, if she died intestate her husband would take it, and it would therefore fall within the mischief aimed at by STIRLING, J. On the other hand, if she made a will bequeathing a vested remainder, the mischief in question would seem not to arise. Possibly the difficulty might be solved if the rule were still more elaborated, and such covenants were held binding on the wife with regard to property falling into possession during the coverture only, and on the husband as to property coming to him *jure mariti*, whether during the coverture or afterwards. But this is a question for future decision.

*Quære*, whether a husband's covenant would bind separate property of the wife vesting in him as her administrator.

## PARAGRAPH (2).

The cases in relation to what words do, and what do not indicate an intention to settle property acquired after the marriage, are very conflicting, and probably each case must be judged on the actual words used. But in *Williams v. Mercer* (1884), 10 App. Cas. 1, it was held that in the absence of any explanatory recitals, a covenant to settle property to which "the wife or the husband in her

Covenant which apparently comprises future acquired property only may sometimes bind present property as well.

**Art. 70.**

Para. (2).

*right shall become entitled during the coverture*” comprised property to which *she* was entitled at the moment of the marriage, inasmuch as by the fact of the marriage the husband became entitled *jure mariti*.

Whether the Married Women’s Property Act, 1882, has altered this, would seem to be a nice question, having regard to the decision in *Hancock v. Hancock* (1888), 38 Ch. D. 78, p. 367, *supra*. It is, however, conceived that it has ; as it would be a *petitio principii* to assume that s. 19 of the Act applied when the very object of the enquiry is whether a settlement of the property in question was in existence.

However this may be, it seems clear, that where the covenant is merely to settle property to which the *wife* shall become entitled, then the covenant will not embrace present property of the wife’s. And the rather thin and scholastic construction adopted in *Williams v. Mercier*, *supra*, will readily yield to anything in the context, showing that property to which the wife was *then* entitled was not intended to be included ; *e.g.*, a recital. See *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300, and see also *Re Viant’s Settlement Trusts* (1874), 18 Eq. 436.

## PARAGRAPH (3).

Assuming that the covenant is restricted to *future* property of the wife, the question then arises, what constitutes *future* property. Paragraph (3) is believed to enunciate correctly the principles which regulate that question.

That this is so, is, it is submitted, apparent from the following considerations : A covenant to settle future-acquired property (without more) is sufficiently wide to embrace (1) that which may be hereafter acquired in possession, although it has already been acquired in title, and (2) that which may be acquired in title only, although possession may never be obtained during the coverture ;

On the assumption that the covenant only relates to future property, question arises what future property is bound.

Argument proving that there must be a new ownership, or a change in the old

but it cannot possibly embrace that to which a *title* has already been acquired, which title is not followed during the coverture by the actual right to possession. In short, such a covenant is aimed at some future change of ownership, which may be either a change of title or a change of the actual right to enjoy; and where neither one or other occurs, there is nothing on which the words of the covenant can act.

Art. 70.

Para. (3).  
one, to bring property within a covenant to settle future property.

Thus, where a vested remainder to which the wife is entitled at the date of the settlement does *not* fall in during the coverture or the life of the husband (if he be survivor), it will not be bound by the covenant to settle future-acquired property; for the wife, *ex hypothesis*, has acquired no new right in it since the settlement. See *Re Jones's Will* (1876), 2 Ch. D. 362; *Re Pedder's Settlement Trusts* (1870), 10 Eq. 585; *Re Clinton's Trust* (1872), 13 Eq. 295. See also *Re Mitchell's Trusts* (1878), 9 Ch. D. 5, where the wife's interest was contingent at the date of the settlement, became vested during the coverture, but did not fall into possession until after the coverture determined, and it was held to fall within the covenant.

A remainder vested at the marriage not bound unless it falls in during the husband's life.

But when such a vested remainder does fall in during the coverture (or where the period for which the covenant is to be operative is not named, if it falls in during the life of the husband (*Fisher v. Shirley* (1889), 43 Ch. D. 290)), then it is bound; for the wife has acquired a new right since the settlement, *viz.*, the right to the present enjoyment of the property (*Blythe v. Granville* (1842), 13 Sim. 190; *Spring v. Pride* (1864), 1 De G. J. & S. 395; *Re Clinton's Trust* (1872), 13 Eq. 295). The same rule applies with increased force to an interest contingent at the date of the marriage which falls into possession during the coverture (*Archer v. Kelly* (1860), 1 Dr. & Sm. 300; *Brooks v. Keith* (1861), *Ibid.*, 462).

*Altho*—if it does fall in.

*A fortiori* will the property be bound where the wife had no title whatever to it at the date of the marriage, if she

A remainder which is not contingent.

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at date of  
marriage is  
bound, even  
although it  
does not fall  
in during the  
husband's  
life.

acquires a title, although it be only in remainder or reversion, during the period which the covenant covers. For it is clearly an entirely new proprietary right, and not (as in the last case) merely the change of a right in reversion to a right in possession (*Hughes v. Young* (1863), 32 L. J. Ch. 137; *Dickinson v. Dillwyn* (1869), 8 Eq. 546; *Cowper-Smith v. Anstey*, W. N. (1877), 28).

ART. 71.—*Covenants to settle a definite Interest  
in Property.*

Where the covenant is to settle a definite estate or interest in property, if that interest subsequently becomes enlarged, the covenant does not bind the enlarged interest; and if the definite interest fails, but the covenantor acquires the property under another title, it will not be bound.

Property not  
bound if it  
comes to the  
covenantor  
in a different  
way to that  
contemplated  
by the  
settlement.

In *Sweetapple v. Horlock* (1879), 11 Ch. D. 745 (corrected in *Re Jackson's Will* (1879), 13 Ch. D. 189), the intended wife being entitled to a reversionary interest under her parent's settlement liable to be defeated by the exercise by her father of a power of appointment, covenanted to settle all property which she was "then seised of or interested in or entitled to." The father subsequently exercised his power, and appointed to her exactly the same proportion of the property which she would have taken in default of appointment. On these facts, JESSEL, M.R., held that the wife's covenant did not comprise the appointed share, although it would have done so if the share had come to her in default of appointment, saying: "A conveyance by a person by innocent assurance, of an interest expressed as being subject to be defeated by the exercise of a power does not convey an interest which that person might take under the power. This is not like a settlement of all property which might come to the wife

in any event, but only of that which was then vested in or belonging to her.”

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So, in *Smith v. Osborne* (1858), 6 H. L. Cas. 375, it was laid down, that where a man in his marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when “such remainder” shall become vested in possession, he will convey it to the uses of his settlement; if he becomes possessed of either of these pieces of land by a title different from that described in the covenant, the covenant will not bind him. As Lord WENSLEYDALE put it, the point resolved itself into this: “Is this a covenant to convey the townlands of Stonehouse to the trustees absolutely, whenever the covenantor was entitled to them in possession? Or is it a bargain only with respect to the contingent interest, or *specie successionis*, or more correctly, a bargain to convey the estates conditionally, if they should vest in possession in Mr. Boyse Osborne, the covenantor under the will of the grandfather, Thomas Carr?” His lordship then pointed out that in the words of the covenant, it was only to take effect if the estate became vested in the covenantor under the will of his grandfather, and that, as a matter of fact, it became vested in him in defiance of that will, by gift from a tenant in tail under that will, who had disentailed. He further remarked (in reference to an argument of the trustee’s counsel that there was an obvious intention to settle the estates themselves) that that was “to apply a wrong rule of construction. It is to interpret the covenant, not according to the meaning of the words used but according to what the parties may be reasonably supposed (judging from the circumstances in which they were placed) to have been likely to intend to do when they entered into the contract . . . . The only safe rule of construction is to ascertain the meaning of the words used, and in this case I think it is too clear to admit of any doubt.”

## Art. 72.

ART. 72.—*Covenants to settle Property exceeding a certain Value.*

Where the covenant is to settle property exceeding a certain value :

- (1) That value is the actual net value of the property itself after deducting duties, and not the actuarial value of the wife's interest in it; and
- (2) That value is *prima facie* construed to mean the value of funds derived from the same source. But two legacies from one testator are so derived.

## PARAGRAPH (1).

Where the covenant is to settle property which is worth more than a minimum sum, the property itself, and not the value of the covenantor's interest in it, governs the question.

In *Re Mackenzie's Settlement* (1867), 2 Ch. App. 345, a marriage settlement contained a covenant that, if the wife then was, or should, at any time during the coverture, become entitled to any real or personal estate of the value of £400, for any estate or interest, it should be settled. At the date of the settlement, she was entitled (under a prior settlement) in remainder, expectant on her mother's death, to (a) a share of a sum of stock in her own right, and (b) a further share of the same stock as one of the next-of-kin of a deceased brother. The value of the two shares taken together was above £400 but the actuarial value of the wife's reversionary interest in them, at the date of the settlement, was considerably less than £400 :—*Held*, that both shares were included in the settlement, the true interpretation of the covenant being that it referred to the value of the property itself, and not to the value of the wife's reversionary interest in it. In giving judgment, CAIRNS, L.J., said : “ It is admitted that the share payable to her out of the fund, on her brother's

death, would exceed £400 after all deductions; but it is said that the value of this share in the year 1861 [the date of the marriage] was under £400. The covenant, however, in my opinion, does not refer to the value of her interest in the fund, but to the value of the fund in which she has an interest; just as we should say that a man was entitled to an estate of the value of £100,000 on the death of his father, merely to describe the value of the estate, and not the interest in the estate."

Art. 72.

Para. (1).

The value is, however, the net value and not the gross value; so that if after deducting death duties, cost, etc., it falls below the stipulated amount it will escape the covenant (*Re Pares*, [1901] 1 Ch. 708).

The value to be ascertained is the net value.

#### PARAGRAPH (2).

It will be seen that, in the case last cited, the aggregate of the two funds was held to be bound, although singly they were of insufficient amount. But although they accrued to the lady under two titles, they were derived from the same source, viz., the original settlement. Care must, however, be taken to distinguish between covenants where nothing is said upon this point and those in which the question is distinctly dealt with. For instance, in the case last cited it appears that there were two distinct funds, neither of which taken alone would have fallen under the covenant, but which, taken together, exceeded the value mentioned in the covenant. It also appears that although they came to the lady under different titles, they were held to be bound by the covenant. Nevertheless, it appears to be well settled that in such cases the fund will not be bound unless all its parts are derived from *the same source* (*Re Hooper* (1865), 13 W. R. 710; *Hood v. Franklin* (1873), 16 Eq. 496). The same source, however, does not necessarily mean under the same title. In the case now being considered (*Re Mackenzie's Settlement*) both funds were derived from the

Implied term that the prescribed value refers to property derived from the same source.

**Art. 72.**

Para. (2).

same source (viz., the prior settlement) although part was derived directly and part as the next-of-kin of a brother. And in the same way it has more recently been held, that two separate legacies derived from the same testator are derived from the same source and at the same time (*Re Pares*, [1901] 1 Ch. 708).

Cases where the covenant limits the fund to be settled to funds acquired "at one time."

Care must be taken to distinguish between covenants such as those in *Re Hooper* and *Hood v. Franklin* (*supra*) where nothing is said upon the point, and those in which the fund to be settled is expressly declared to be a minimum sum derived from one and the same source, and "at one and the same time." For instance, in *Bower v. Smith* (1871), 19 W. R. 399 (the report in 11 Eq. 279 is misleading and incorrect,—see *Steward v. Poppleton* (1877), W. N. p. 29), the covenant was to settle property exceeding £500 in value which the wife should acquire "at any one time." She afterwards became the donee of a general power of appointment over a fund of £5,499 19s. 1d. This power she exercised by eleven successive appointments in favour of herself for sums under £500 each. On these facts it was held that the appointed funds were not bound, for although they were all derived from the same source, they were not acquired at the same time, *i.e.*, at the same moment.

Sums already advanced to the lady out of a fund.

Where the fund originally exceeds the minimum named in the covenant, but by reason of advances made to the lady while it was still reversionary the fund has been reduced below that minimum, the amount so advanced must be included for the purpose of determining whether the fund is large enough to be brought into settlement.

## GLOSSARY

*Of Words and Phrases most frequently occurring in Wills and Settlements.*

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**Absolute gift.**—See *supra*, p. 169.

**Absolute power.**—Does not make life tenant punishable for waste : *Pardoe v. Pardoe* (1900), 82 L. T. 547. And see p. 177.

**Actual possession.**—See *supra*, p. 219.

**Alienate or incumber.**—Includes adjudication in bankruptcy on life tenant's own petition : *In re Cotgrave, Myrers v. Cotgrave*, [1903] 2 Ch. 705.

**And.**—*Held* to mean "or" ; in direct gift : *Hawes v. Hawes* (1747), 1 Ves. sen. 13 ; *Stapleton v. Stapleton* (1852), 2 Sim. (n.s.) 212 ; *cf. Malmesbury v. Malmesbury* (1862), 31 Beav. 407 ; and in gift over : *Lane v. Lane* (1885), 17 L. R. Ir. 11 ; *cf. Bell v. Phoenix* (1802), 7 Ves. 453 ; *In re Coley, Gibson v. Gibson*, [1901] 1 Ch. 40.

*Held* not to mean "or" : *Coates v. Hart* (1863), 32 Beav. 349 ; *Grey v. Pearson* (1857), 6 H. L. Cas. 61 ; *cf. Brownsword v. Edwards* (1751), 2 Ves. sen. 243.

**As far as the rules of law and equity will permit.**—*R. Hill, Hill v. Hill* (1902), 86 L. T. 336.

**Assigns.**—Devise to "heirs and assigns" of life tenants ; assigns means assigns of heirs : *Melton v. Lane*, [1901] 2 K. B. 745.

**Become bankrupt.**—See *In re Raw, Esq. part of Willough*, [1904] 1 K. B. 451.

**Benefit of survivorship.**—Meaning in case of postponed gift : *Wiley v. Chantependrie*, [1894] 1 L. R. 290.

**Born in my lifetime.**—See *supra*, p. 75, and *Willis v. Gifford*, [1900] 1 Ch. 582.

**Brother.**—*Held* to include brother of the half blood : *Green v. Ransley* (1862), 10 Hare, 63. This rule applies to all terms of relationship—as sisters, nephews, nieces, etc. (*ibid.*). See *supra*, p. 77.

**Business.**—Gift of, does not carry the premises on which it is carried on : *Re Henton, Henton v. Henton* (1882), 30 W. R. 702 ; and see also *Blake v. Shaw* (1860), Joh. 732, and *Delaney v. Delaney* (1885), 15 L. R. Ir. 55.

**Cash or moneys.**—Does not include promissory notes payable to testator's order, bonds, or long annuities : *Beales v. Crisford* (1843), 13 Sim. 592.

**Charitable, educational, or other institutions.**—*Re Allen, Hargreaves v. Taylor*, [1905] 2 Ch. 400 ; *In re Church Patronage Trust, Laverie v. Att.-Gen.*, [1904] 2 Ch. 643. See *supra*, pp. 60, 61.

**Chattels real.**—Includes leasehold rentcharge : *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726. See *supra*, p. 153.

**Child.**—*Primâ facie* does not include grandchild : *In re Coley, Gibson v. Gibson*, [1901] 1 Ch. 40. See *supra*, p. 77.

Same principle applies to other terms of relationship as nephews, nieces, etc. : *Crook v. Whitley* (1857), 7 D. M. & G. 490 ; and grandchild : *Lord Orford v. Churchill* (1814), 3 V. & B. 59. See *supra*, p. 77.

Means *primâ facie* legitimate child. See *supra*, p. 77, and *In re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573.

**Children.**—Where read heirs of the body, pp. 222, 223. As a word of limitation, p. 224.

**Children born.**—See *supra*, pp. 73—75.

**Children of A. and B.**—*Primâ facie* not a class. See *supra*, pp. 92, 236.

**Children or legal representatives.**—Gift over to daughter's children or legal representatives means representatives of daughter : *In re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200.

**Company.**—Investment clause, meaning of in : *In re Stanley, Tennant v. Stanley*, [1906] 1 Ch. 131.

**Confirmation of will.**—By codicil, only confirms as originally executed, not as altered since execution : *In re Hay, Kerr v. Stinnear*, [1904] 1 Ch. 317.

**Contrary or other intention.**—See *In re Valpy, Valpy v. Valpy*, [1906] 1 Ch. 531.

**Cousins.**—*Prima facie* means first cousins : *Stoddart v. Nelson* (1855), 6 D. M. & G. 68 ; and see *supra*, p. 77.

Held to include wife of cousin : *In re Taylor, Clark v. Hammond* (1886), 34 Ch. D. 255.

"Second cousins" held to include first cousins once removed : *In re Bonner, Tucker v. Good* (1881), 19 Ch. D. 201 ; *Wilks v. Barrister* (1885), 30 Ch. D. 512 ; *contra* : *In re Parker, Bentham v. Wilson* (1881), 17 Ch. D. 262.

**Daughters.**—Sisters held to take : *Re Waller, White v. Stodes* (1899), 80 L. T. 701.

**Descendants.**—Held not to be confined to children unless the context was clearly to that effect : *Ralph v. Carrick* (1879), 11 Ch. D. 873 ; *cf. Williamson v. Moore* (1862), 10 W. R. 536. See *supra*, p. 91.

**Die without ever having been married.**—*Prima facie* excludes children : *In re Smith's Settlement, Wilkins v. Smith*, [1903] 1 Ch. 373 ; *In re Brydone's Settlement, Cobb v. Blackburne*, [1903] 2 Ch. 84.

**Die without leaving children.**—See *In re Cobbold, Cobbold v. Lacton*, [1903] 2 Ch. 229 ; *In re Edwards, Jones v. Jones*, [1906] 1 Ch. 570. And, *supra*, p. 229.

**Die without leaving children her surviving.**—See *In re Edwards, Jones v. Jones*, [1906] 1 Ch. 570.

**Discretion.**—See *Gisborne v. Gisborne* (1877), 2 App. Cas. 300 ; *Re Square's Trusts*, [1901] 17 T. L. R. 724 ; *Grimond v. Grimond*, [1905] A. C. 124.

**Domestic servant.**—Does not include landlady working in house and providing own food and lodging : *In re O'Brien, O'Brien v. O'Brien*, [1903] 1 T. L. R. 525.

**Duties payable out of my estate.**—Includes estate duty : *In re Cooper, Cooper v. Cooper*, [1904] 2 Ch. 781 ; *cf. In re Lane, Lane v. Smith*, [1900] 2 Ch. 176 ; *Re Turnbull, Stappes v. West*, [1905] 1 Ch. 726.

**Duty free.**—Provision that all bequests shall be, extends to bequests given by will only, *Re Seale, Tuckers v. Tucker* (1901), 80 L. T. 451.

**Effects.**—(1) *Per se* does not include realty ; (2) even if stated to be “devised” by the will : (3) or described as “of what nature, kind or quality whatever” : *per* FRY, L.J., in *Hall v. Hall* (No. 2), [1891] 3 Ch. 389 ; but in a will not drawn by a lawyer, may include realty where there is a reference to locality and the “effects” are afterwards described as property : *idem.*, affirmed, [1892] 1 Ch. 361.

**Effects at my house.**—*Held* to include cash and book debts : *In re Parrott*, *Parrott v. Parrott* (1885), 53 L. T. 12 ; and horses, carriages, etc., in outhouses : *Watson v. Arundel* (1876) Ir. R. 10 Eq. 299. See *supra*, p. 25.

See “HOUSEHOLD EFFECTS” and “HOUSEHOLD GOODS.”

**Eldest male issue.**—See *Sheridan v. O'Reilly*, [1900] 1 I. R. 386.

**Eldest son.**—*Supra*, pp. 70, 73.

**Entitled, become.**—See *In re Bland's Settlement*, *Bland v. Perkin*, [1905] 1 Ch. 4.

**Entitled to the possession and receipts.**—See *In re Fothergill's Estate*, *Price-Fothergill v. Price*, [1903] 1 Ch. 149.

**Estate.**—See *supra*, pp. 161—164.

**Estate and effects in M.**—*Held* to include unpaid purchase-money of land in M. sold by testator : *Guthrie v. Walrond*, 22 Ch. D. 573.

**Estate and interest, all my.**—Where no interest no case of election arises : *Galvin v. Devereux*, [1903] 1 I. R. 185.

**Estate duty** includes settlement estate duty : *Re Leveridge, Spain v. Lejoindre*, [1901] 2 Ch. 830. See also *Re Mechorough, Savile v. Mechorough* (1902), 86 L. T. 331 ; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

**Exception** from class of individual entitled to rents of B. estate fails if B. estate sold in lifetime of testator : *Law Union and Crown Insurance Co. v. Hill*, [1902] A. C. 263.

**Exception** from residue. See *Re Johnson, Sandy v. Reilly* (1905), 92 L. T. 357.

**Family.**—*Held* to mean children, *i.e.*, not including father or mother : *Barnes v. Patch* (1803), 8 Ves. 604 ; *Pigg v. Clarke* (1876), 3 Ch. D. 672 ; *Re Mulqueen's Trusts* (1881), 7 L. R. Ir. 127 ; mother included : *Blackwell v. Bull* (1836), 1 Keen, 176, and see *In re Drew, Drew v. Drew*, [1899] 1 Ch. 336 ; father included : *James v. Lord Wynford* (1854), 23 L. J. Ch. 767 ; grandchildren not included : *In re Battersby's Trusts*, [1896] 1 L. R. 600 ; in connection with realty, construed heir : *Griffiths v. Evan* (1842) 5 Beav. 241 ; in connection with power of appointment, construed any relative : *Snow v. Teed* (1870), 9 Eq. 622.

“Under different circumstances it (family) may mean a man's household, consisting of himself, his wife, children and servants ; it may mean his wife and children, or his children excluding the wife, or in the absence of wife and children, it may mean his brothers and sisters or his next-of-kin ; or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance” : *Blackwell v. Bull* (1836), 1 Keen, 181.

**Farming stock.**—*Held* to include growing crops : *In re Roost, Evans v. Williamson* (1881), 17 Ch. D. 696.

**Foreign.**—*Held* not to include “colonial” in a gift of foreign bonds : *Hull v. Hull* (1876), 4 Ch. D. 97 ; *Cudett v. Earle* (1877), 46 L. J. Ch. 798.

**Free from duty.**—See “DUTY,” *supra*.

**Freeholds.**—May include customary freeholds : *Re Steel, Wappett v. Robinson*, [1903] 1 Ch. 135. See *supra*, p. 20.

**Freehold ground rents.**—Clause as to investment in, covers purchase of, ground rents : *In re Mordan, Long v. Mordan*, [1906] 1 Ch. 515.

**Furniture.**—*Held* to include pictures placed on the wall as ornaments : *Greene v. Antrobus* (1828), 5 Russ. 312 ; and fixtures : *Paton v. Sheppard* (1839), 10 Sim. 186 ; but *cf. Pinner v. Grier* (1878), 10 Ch. D. 13 ; and plate in actual use : *Cole v. Fitzgerald* (1827), 3 Russ. 301.

*Held* not to include books : *ibid.*, but *cf. Hutchins v. Smith* (1863), 8 L. T. 602 ; nor jewellery, guns, pistols, etc. : *Manton v. Talbot* (1885), 30 Ch. D. 92.

See “HOUSEHOLD EFFECTS” and “HOUSEHOLD GOODS.”

**Furniture and contents.**—See *Re McCalmont, Roper v. McCalmont* (1903), 19 T. L. R. 490.

**Furniture and other personal effects.**—Does not include trade or tenant's fixtures: *In re Seton-Smith, Burnard v. Waite*, [1902] 1 Ch. 717.

**Futurity.**—Words of, *prima facie* refer to events happening after testator's death: *Re Chapman, Perkins v. Chapman*, [1904] 1 Ch. 431.

**Goodwill.**—Does not *prima facie* include the business premises: *Cruttwell v. Lye* (1810), 17 Ves. 335, 346; cf. *Trego v. Hunt*, [1896] A. C. 7; *Hill v. Fearis*, [1905] 1 Ch. 466, at p. 471.

**Ground rents.**—See "FREEHOLD GROUND RENTS," *supra*.

**Heir.**—As descriptive of donee. See *supra*, pp. 201, 213.

**Heirs.**—As descriptive of donee. See *supra*, pp. 200, 201. As word of limitation. See *supra*, pp. 189, 210—216; *Appleton v. Rowley* (1869), 8 Eq. 139; and *Keay v. Boulton* (1884), 25 Ch. D. 212.

In gift of personalty:—*Held* to mean next-of-kin according to the statute: *In re Steeven's Trusts*, L. R. 15 Eq. 110; *In re Newton's Trusts* (1867), 4 Eq. 171; *Keay v. Boulton* (1884), 25 Ch. D. 212.

*Contra*: *Smith v. Butcher* (1878), 10 Ch. D. 113.

In gift of realty:—*Held* to mean common law heir: *Garland v. Beverley* (1878), 9 Ch. D. 213.

**Heirs-at-law.**—Gift over among testator's heirs-at-law; *prima facie* means heir at testator's death, not at time gift takes effect in possession: *Ware v. Rowland* (1847), 15 Sim. 587; *Re Frith, Hindson v. Wood* (1901), 85 L. T. 455.

**Heirs of the body.**—As words of limitation. See *supra*, pp. 210—216.

As to gifts of personalty:—*Held* to mean descendants who are next-of-kin according to the statute: *In re Jeaffreson's Trusts* (1866), 2 Eq. 276. And see *supra*, pp. 220, 221.

**Heirs lawfully begotten.**—See *supra*, p. 226.

**Heirs male.**—See *supra*, p. 225.

**Hereditaments.**—Includes money held in trust for investment in land : *In re Gosselin, Gosselin v. Gosselin*, [1906] 1 Ch. 120. See *supra*, p. 26.

**Hotchpot.**—Clauses classified : *In re Kelsey, Woolley v. Kelsey*, [1905] 2 Ch. 465.

**Household effects.**—*Held* to include wine in cellar : *Re Bourne, Bourne v. Brandreth* (1887), 58 L. T. 537.

*Held* not to include jewellery : *Northey v. Paxton* (1888), 60 L. T. 30 ; or cattle and farming stock : *Stone v. Parker* (1860), 29 L. J. Ch. 874 ; or personal ornaments : *Tempest v. Tempest* (1856), 2 K. & J. 635.

**Household furniture and effects.**—Does not include stock-in-trade on premises : *MacPhail v. Phillips*, [1904] 1 I. R. 155.

**Household goods.**—*Held* to include plate and clocks, even when not kept in testator's house : *Pellor v. Horsford* (1856), 25 L. J. Ch. 352.

**Income.**—See *supra*, p. 136. And *Sheridan v. O'Reilly*, [1900] 1 I. R. 386.

**Investments.**—Does not include money on deposit at a bank : *Re Price, Price v. Newton*, [1905] 2 Ch. 55.

**Issue.**—Primary meaning "descendants" : *Leigh v. Norbury* (1807), 13 Ves. 340, and *Sheridan v. O'Reilly*, [1900] 1 I. R. at p. 393.

When read "children," see *supra*, pp. 89—91, and *Harris v. Loftus*, [1899] 1 I. R. 491.

In devise held equivalent to "heirs of the body" : *Reddy v. Fitzerald* (1857), 6 H. L. Cas. 823.

In gift of personality held equivalent to "children" : *In re Hopkins' Trust* (1878), 9 Ch. D. 131.

**Jointure.**—As to second marriage, see *supra*, p. 68.

**Land.**—See *supra*, pp. 141, 164—168.

**Lawfully assume arms.**—Means more than mere voluntary assumption : *Lo v. Cronin, Cronin v. Ferris*, [1904] 1 Ch. 252.

**Legal representatives.**—See *supra*, "CHILDREN OR LEGAL REPRESENTATIVES."

**Maintenance.**—Money to be applied for: effect of direction: *Re Yates, Yates v. Wyatt*, [1901] 2 Ch. 438.

**Money.**—Held not to include stock in public funds: *Lower v. Thomas* (1854), 5 D. M. & G. 315; *Re Sutton, Stone v. Att.-Gen.* (1885), 28 Ch. D. 464; *Gosden v. Dotteril* (1832), 1 My. & K. 56; *Cowling v. Cowling* (1859), 26 Beav. 449; *Collins v. Collins* (1871), 12 Eq. 455.

*Contra*: *Waite v. Combes* (1852), 21 L. J. Ch. 814; *Moysey v. Stuart* (1871), 23 L. T. 644; *Chapman v. Reynolds* (1860), 28 Beav. 321.

Held to include balance at bank: *Manning v. Purcell* (1856), 7 D. M. & G. 55; *Heming v. Whittem* (1829), 2 Sim. 493.

*Contra*: *Loring v. Thomas* (1861), 5 L. T. 269.

Held to include money due as rent and money secured by bond: *Lloyd v. Lloyd* (1886), 54 L. T. 841; *Langdale v. Whitfield* (1858), 4 K. & J. 426.

*Contra*: *Read v. Stewart* (1827), 4 Russ. 69.

Held to be equivalent to "effects," and so to pass all the testatrix's personal estate: *Re Cadogan* (1884), 25 Ch. D. 154; *Re Goods of Bramley*, [1902] P. 106.

"There should be no absolute technical meaning given to such a word as 'money' in a will, but its meaning in every case must depend upon the context if there is any which can explain it, and upon those surrounding circumstances, which the court is bound to take into consideration in determining the construction": *per* KAY, J., *ibid.*, at p. 157.

**Money in bank.**—Legacy paid unknown to testatrix into bank to her credit not included: *Masson v. Smellie* (1904), 6 F. (Ct. of Sess. Cas.) 148.

**Moneys owing to me at my decease.**—Includes money on deposit at bank whether notice of withdrawal is required or not: *In re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135.

As to statute barred debts, see *Re Jolly, Gatharcol v. Norfolk*, [1900] 2 Ch. 616.

**Month.**—Means in all documents primarily lunar month: *Bruner v. Moore*, [1904] 1 Ch. 305. See *supra*, p. 20.

**Natural representatives** means next of kin: *Re Bromley, Wilson v. Bromley* (1900), 83 L. T. 315.

**Nearest relations.**—*Held* equivalent to relations nearest in blood of equal degree, and not next of kin according to the statute : *Smith v. Campbell* (1815), 19 Ves. 400.

**Nephews and nieces** means *primâ facie* children of brothers and sisters or half-brothers and sisters : *Re Reed* (1888), 57 L. J. Ch. 790 ; and not great-nephews and nieces : *Williamson v. Moore* (1862), 10 W. R. 536 ; nor wife's nephews and nieces : *Merrill v. Morton* (1881), 17 Ch. D. 382 ; *aliter*, nephews and nieces "on both sides" : *Frogley v. Phillips* (1861), 3 D. F. & J. 466 ; *cf. Re Cozens, Miles v. Wilson*, [1903] 1 Ch. 138.

**Next of kin.**—*Held*, when used *simpliciter*, to mean nearest blood relations in equal degree to the *propositus* : *Halton v. Foster* (1878), 3 Ch. App. 505 ; *Withy v. Mangles* (1843), 10 Cl. & F. 215.

Does not include a wife or husband : *Garrick v. Lord Camden* (1807), 14 Ves. 372.

In an English will must be construed by English law, although the *propositus* is a foreigner : *Re Ferguson's Will*, [1902] 1 Ch. 483.

**Next of kin, as if she had never been married.**—*Re Smith's Settlement, Wilkins v. Smith*, [1903] 1 Ch. 373 ; *Re Brydson's Settlement, Cobb v. Blackburne, ib.* 2 Ch. 84 ; *Re Pearson, Cayley v. De Wend* (1903), 51 W. R. 519.

**Next of kin, exclusive of A.**—Those who would be next of kin if A. were dead : *White v. Springett* (1878), 4 Ch. App. 300.

**Occupation.**—See *supra*, p. 132.

**Offspring.**—*Held* to mean children : *Tabuleara v. Neave* (1899), W. N. 115.

**Option to purchase.**—Whether personal or transmissible—see *Re Crosses, Alexander v. Cross* (1885), 30 Ch. D. 203 ; *Green v. Messing* (1893), 31 L. R. Ir. 126. As to effect on, of a compulsory purchase by a railway company, see *Re Great* (1859), 4 De G. & J. 503 ; *Re Kemp* (1889), W. N. 3.

**Or.**—*Held* to mean "and" in direct gifts : *Reed v. Seidl* (1743), 2 Atk. 645 ; *Greenway v. Greenwood* (1800), 2 D. F. & J. 128 ; in gifts over : *Johnson v. Semorck* (1801), 7 H. & N. 344 ; *Morris v. Morris* (1853), 17 Beav. 198 ; *Green v. Hawson* (1842), 1 Ha. 428 ; *Streeton v. Fitzgerald* (1889), 23 L. R. Ir. 210 ; *Collett v. Collett* (1896), 35 Beav. 312 ; *Booth v. Misch* (1858), 25 Beav. 197 ; *Waddell v. Mundy* (1801), 6 Ves. 341 ; *Grey v. Pearson* (1857), 6 H. L. Cas. 61. *Held* to mean "or" : *Re Dayrell, Hootin v. Dayrell*, [1904] 2 Ch. 496. See *supra*, p. 34.

**Outgoings.**—See *Stockdale v. Ascherberg*, [1904] 1 K. B. 447 ; *Morris v. Beul*, [1904] 2 K. B. 585.

**Pecuniary investment.**—Does not include money on deposit at bank : *In re Price*, *Price v. Newton*, [1905] 2 Ch. 55.

**Personal estate.**—In Lord Kingsdown's Act includes leaseholds : *In re Grassi*, *Stubberfield v. Grassi*, [1905], 1 Ch. 584.

May sometimes include real estate : *Re Andrew's Estate*, *Crusey v. Graves* (1902), 50 W. R. 471.

**Plate.**—Does not include plated articles : *Holden v. Ramsbottom* (1863), 4 Giff. 205.

**Portion.**—Accumulation till youngest child attains twenty-one are *portions* within Accumulations Act, 1800 : *In re Stephens*, *Kilby v. Betts*, [1904] 1 Ch. 322.

**Power.**—Exerciseable by will or any writing purporting to be a will. See *Re Broad*, *Smith v. Draefer*, [1901] 2 Ch. 86.

**Public company.**—See *In re Castlehow*, *Lamonby v. Carter*, [1903] 1 Ch. 352. See *supra*, p. 27.

**Ready-money.**—*Held* to include balance at bank (*Parker v. Marchant* (1843), 1 Phill. 356 ; *Re Powell* (1858), Johns. 49 ; *Stein v. Ritherdon* (1868), 37 L. J. Ch. 369 ; *Taylor v. Taylor* (1837), 1 Jur. (o.s.) 401 ; *Mayne v. Mayne*, [1897] 1 Ir. R. 324). And see *In re Derbyshire*, *Webb v. Derbyshire* [1906] 1 Ch. 135, at p. 138.

*Held* not to include dividends : *May v. Grave* (1849), 3 De G. & Sm. 462 ; *Stein v. Ritherdon*, *supra*.

*Contra* : *Fryer v. Ranken* (1840), 11 Sim. 55.

*Held* not to include consols and stock : *Enolim v. Wylie* (1862), 8 H. L. Cas. 1 ; 6 L. T. 263.

*Contra* : *Waite v. Combes* (1852), 5 De G. & Sm. 676.

"If we had found in the will a description of a portion of his property as ready money without more, we might, in deference to the evident intention of the testator to make a general disposition of all his property, have followed the decision of PARKER, V.-C., in *Waite v. Combes*, and given a latitude of meaning to the words to make them comprehend stock in English funds. But when we find a bequest expressed in these terms—"the whole of my capital which shall remain with me after my death in ready money"—I do not see how it is possible, without doing the greatest violence to language, to give them the enlarged meaning": *per* Lord CRANWORTH, in *Enolim v. Wylie* (1862), 6 L. T. 263, at 267.

**Ready-money at bank.**—*Held* to include money on deposit where no notice required, but not to include such where any notice was necessary for withdrawal : *Magnus v. Magnus*, [1897] 1 I. R. 324. And see *In re Price*, *Price v. Norton*, [1905] 2 Ch. 55 ; *In re Wheeler*, *Hawkinson v. Hayter*, [1904] 2 Ch. 66.

**Relatives.**—*Held* to mean relatives who could take under the statute : *Deod. Thwaites v. Oger* (1808), 1 Taunt. 263 ; *cf.* *Att.-Gen. v. Price* (1810), 17 Ves. 371 ; and *Harding v. Glyn* (1739), 1 Atk. 469. And see *In re Patterson*, *Dunlop v. Gieser*, [1899] 1 I. R. 324.

See *supra*, pp. 76 *et seq.*, and *infra*, "NEAREST RELATIONS."

**Rents and profits.**—See *supra*, p. 136.

**Repair.**—Condition as to legatee keeping property in repair does not cover dilapidations arising in testator's lifetime : *Re Smith*, *Bull v. Smith* (1901), 84 L. T. 835.

**Representatives.** Representatives or "legal" or "personal" representatives *prima facie* means executors or administrators : *In re Best's Settlement* (1874), 18 Eq. 686.

**Residuary legatee.**—Appointment of, may, in certain cases, give such legatee the testator's real as well as personal estate : see *Day v. Dameron* (1841), 12 Sim. 200 ; *Dunceport v. Chittman* (1842), 9 M. & W. 481 ; *Pitman v. Stevens* (1812), 15 East, 595 ; *Hughes v. Pritchard* (1877), 6 Ch. D. 24 ; *Re Salter*, *Farrant v. Carter* (1881), 44 L. T. 603 ; *Re Methuen and Blane* (1881), 16 Ch. D. 696. He also takes the residue of the proceeds of real estate directed to be sold : *Simpleton v. Tinsliaison* (1888), 3 App. Cas. 404. And see p. 160.

**Residue.**—See *supra*, pp. 16, 151—158, and *Re Johnson*, *Sandys v. Kelly* (1905), 92 L. T. 357.

**Right heirs.**—Gift of blended fund : *Re Burke*, *Nahra v. Hall* (1900), 34 I. L. T. R. 78.

**Schoolboard.**—Does not always include county council education authority : *Re Board*, *Bulley v. Harris*, [1904] 1 Ch. 270.

**Seashore.**—Identical with foreshore : *Miller v. Widdowley*, [1905] 2 Ch. 164.

**Securities.**—*Held* identical with investments : *In re Gent and Eason's Contract*, [1905] 1 Ch. 386. And under power to vary securities purchased land may be sold : *Re Gent and Eason's Contract*, [1905] 1 Ch. 386 ; *Re Johnson, Greenwood v. Greenwood* (1904), 89 L. T. 520. When used in an investment clause *prima facie* does not comprise shares : *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176 ; but *cf. Re Johnson, Greenwood v. Greenwood, supra.*

**Securities for money.**—*Held* not to include bank notes : *Southcot v. Watson* (1745), 3 Atk. 233.

Or money at bank on deposit receipt : *Hopkins v. Abbot* (1874), 19 Eq. 222.

Or money held by a salesmaster : *Smith v. Butler* (1846), 3 Jo. & Lat. 565 ; or an unpaid legacy : *Re Mason* (1865), 34 Beav. 494 ; or arrears of interest or dividends on stock : *Re Beaven, Beaven v. Beaven* (1885), 53 L. T. 244 ; or shares in a public company : *McDonnell v. Morrow* (1889), 23 L. R. Ir. 591 ; or I. O. U.'s : *Re Beavan, supra.*

But held to include promissory notes, consols, railway debentures : *ibid.* ; vendor's lien for unpaid purchase-money : *Callow v. Callow* (1889), 42 Ch. D. 550.

**Share or interest.**—In a solicitor's business includes capital and undrawn profits : *Re Barfield, Goodman v. Child* (1901), 84 L. T. 28.

**Shares** will apparently pass stock : *Morrice v. Aylmer* (1874), 10 Ch. App. 148 ; L. R. 7 H. L. 717 ; but not debentures or debenture stock : *Dillon v. Arkins* (1885), 17 L. R. Ir. 636 ; *Re Bodman, Bodman v. Bodman*, [1891] 3 Ch. 135 ; and see *In re Whitmore, Walters v. Harrison*, [1902] 2 Ch. 66 ; *Sellar v. Charles Bright & Co., Limited*, [1904] 2 K. B. 446.

**Solemnised.**—Where marriage declared null and void no marriage has been "solemnised" : *In re Garnett, Richardson v. Greenep* (1905), 74 L. J. Ch. 570.

**Spinster and intestate.**—See *Re Forbes, Errington v. Sempell* (1899), W. N. 6.

**Survive her now coverture.**—Does not mean survive her husband, but survive her marriage to him : *In re Crawford's Settlement, Cooke v. Gibson*, [1905] 1 Ch. 11.

**Survivor.**—See *supra*, pp. 301 *et seq.*

**Testamentary expenses.**—See *Re Sharroon, Wright v. Sharroon*, [1901] 2 Ch. 280.

**Thereabouts.**—See *Jelf v. Baker* (1883), 11 Q. B. D. at p. 274.

**Unmarried.**—*Held* to mean “without leaving a widow”: *In re Sanders’ Trusts* (1866), 1 Eq. 675.

*Held* to mean “never having been married”: *Dalglish v. Hall* (1881), 16 Ch. D. 715.

Although the word “unmarried” is one of flexible meaning, and may mean either “never having been married” or “not having a husband” at the time when a gift is to take effect, the former is its natural meaning, and in the absence of any context showing a different intention, the word will be so construed: *per* PEARSON, J., in *Re Servant, Meekins v. Wallby* (1884), 26 Ch. D. 575; *Re Chant, Chant v. Lemon*, [1900] 2 Ch. 345; and *Roberts v. Bishop of Kilmore*, [1902] 1 Ir. R. 333.

**Vertu, articles of.**—See *Re Lamborough, Bridgman v. Fitzwill* (1880), 50 L. J. Ch. 9.

**What is left.**—See *In re Willatts, Willatts v. Atley*, [1905] 1 Ch. 378; [1905] 2 Ch. 135.

**Wife.**—*Held* not to include divorced wife: *In re Morrison, Hobbs v. Morrison* (1889), 40 Ch. D. 30; or woman who had fraudulently gone through ceremony of marriage with testator, well knowing at the time that her husband was then living: *Widdowson v. Joseph* (1866), 2 Eq. 319; *J. Oudry v. Tress* (1867), 5 Eq. 245. And see *supra*, pp. 66–68, and 71–73.

**With all appurtenances.**—See *supra*, p. 426.

**Without having been married.**—*Held* to mean “without leaving a husband,” where the words occurred in an Atlantic trust for the wife’s use if her husband died: *Bedford v. South*, [1894] 1 Ch. 480. *cf. In re Dyball’s will-trust, Cook v. Blackburn*, [1903] 2 Ch. 84.

**Year's wages.**—Gift to servant of, applies only to servants paid yearly wages : *In re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1.

**Younger children.**—*Held* to mean all the children except the one succeeding to an estate : *Macoubrey v. Jones* (1856), 2 K. & J. 684 ; *Ellison v. Thomas* (1862), 1 D. J. & S. 18.

*Held* to include younger son succeeding to estate : *In re Prytherch, Prytherch v. Williams* (1889), 42 Ch. D. 590.

See also *Re Smith's Settlement, Wilkins v. Smith*, [1903] 1 Ch. 373 ; *Re Brydow's Settlement, Cobb v. Brydow*, [1903] 2 Ch. 84.

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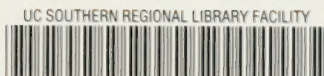
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